Supreme Court, U.S.
FILED
JUL 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CARITA RICHARDSON, BY S. & E. RICHARDSON, GUARDIANS, et al.
Petitioners,

v.

RICHARDSON-MERRELL, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Where the highest court of the local court system has specifically held certain evidence sufficient to support a jury verdict, may a federal court in a subsequent diversity case controlled by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), hold that *that same evidence* is insufficient to go to the jury? Does not the "outcome" test of the *Erie* progeny, particularly *Guaranty Trust Co. of New York v. York*, 326 U.S. 99 (1945), preclude that different result?

2. May Rule 703 of the Federal Rules of Evidence (which permits the use of expert testimony, based on facts or data not admissible in evidence, if "of a type reasonably relied upon by experts in the particular field") be used as a bludgeon by a trial court to deny a jury determination by ignoring evidence presented by eight experts who testify for a plaintiff (and defendant's experts agree) that the evidence is of the type reasonably relied upon by experts in the particular scientific field? Does the Court's refusal to consider this evidence after a jury verdict for the plaintiff violate the Seventh Amendment right to trial by jury, particularly after another Circuit (the 6th Circuit) has held that the issue was one for jury determination?

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CARITA RICHARDSON, BY S. & E. RICHARDSON, GUARDIANS, et al.
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RICHARDSON-MERRELL, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Carita Richardson, et al., petitioners, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the Court of Appeals is reported at 857 F.2d 823. It is reprinted in Appendix A herein, pp. A-1–A-22.

JURISDICTION

The decision of the Court of Appeals was issued on September 27, 1988. A timely petition for rehearing and suggestion for rehearing en banc was denied on April 6,

1989. The jurisdiction of this Court to review the decision below is invoked pursuant to 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION AND RULE INVOLVED

7TH AMENDMENT TO THE CONSTITUTION

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law.

FEDERAL RULES OF EVIDENCE

Rule 703. Bases of Opinion Testimony By Experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

STATEMENT OF THE CASE

This is the case of Carita Richardson, the infant plaintiff, who was born with numerous severe birth deformities on February 16, 1976. Her mother while pregnant had taken the drug Bendectin, which was prescribed for "morning sickness" often suffered by pregnant women. Bendectin was manufactured by the defendant, Richardson Merrell, Inc., and it was the theory of plaintiffs' case that Carita Richardson's birth deformities had been caused by Bendectin. The case was originally filed in the

Superior Court of the District of Columbia and was removed to the federal district court on the basis of diversity of citizenship.

There was a jury trial lasting some eight weeks, during which both sides presented numerous experts. Plaintiffs presented eight experts (including Dr. Alan K. Done), all of whom testified to causation resulting from the ingestion of Bendectin. The jury returned a verdict for plaintiffs, but the District Judge overturned it and ordered judgment N.O.V. (and, in the alternative, a new trial) for the defendant. The Court of Appeals affirmed the judgment N.O.V. for the defendant (857 F.2d 823, pp. A-1–A-22, infra), on the basis of the reasoning of the District Judge, set forth in his decision reported in 649 F.Supp. 799 (1986).

Surprisingly, the Court of Appeals did not apply to this situation the well-known and already oft-repeated standard of its own prior decision, *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1535 (1984), that "the case was thus a classic battle of the experts, a battle in which the jury must decide the victor." Instead, the Court (following the lead of the District Judge) held that there was no "battle of the experts" because plaintiffs' eight experts had—in effect—been made to disappear by the testimony of one of defendant's experts, Dr. Raymond Seltser, who gave his opinion that the scientific literature failed to demonstrate that Bendectin caused birth defects (857 F.2d at 826, p. A-7).

The Court's opinion deals entirely with the testimony of one of plaintiffs' scientific experts, Dr. Alan K. Done, as constituting plaintiffs' case. The only reference of the Court of Appeals to the fact that plaintiffs presented seven other experts, in addition to Dr. Done, occurs in its footnote 38, 857 F.2d at 829, p. A-13, in which the Court says: "Our treatment of Dr. Done's testimony subsumes that of the other experts presented on Richardsons' behalf."

The Court of Appeals, in holding that plaintiffs had not presented evidence sufficient to go to a jury, summed it up this way (857 F.2d at 833, p. A-22):

> . . . the District Judge's grant of judgment N.O.V. in this case did not usurp the jury's function. Whether an expert's opinion has an adequate basis, and whether without it an evidentiary burden has been carried, are issues of law falling within the province of the court.

The Court of Appeals brushed off in a footnote the startling fact that *this very issue* of Bendectin causation had just recently been decided by the highest court of the District of Columbia which, on the same evidence as was presented here, reached a contrary conclusion. In *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100, decided in March of 1986, the District of Columbia Court of Appeals reversed a judgment N.O.V. for this same defendant (there was a name change) and reinstated the jury verdict for plaintiffs, on an analysis that was in conflict with that of the District Judge here and the Circuit Court. The D.C. Court of Appeals in *Oxendine* specifically recognized and adopted a theory of the effect of plaintiffs' evidence that contradicted the theory adopted by the two federal courts.

It was not that the District Judge claimed there was any difference in the evidence presented in the two cases. He specifically said, at the beginning of his decision (649 F.Supp. at 799), issued in December of 1986: "This trial was a virtual reprise of *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100 (D.C. 1986), . . ." And immediately thereafter, referring to the fact that the trial judge in *Oxendine* had set aside a jury verdict for plaintiffs, the District Judge said: "This Court, having heard *substantially the same evidence* as the trial judge in *Oxendine*, is of the same opinion as to its efficacy." (Emphasis added).

Although this was a diversity-of-citizenship case controlled by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), the District Judge made no mention of the *Erie* doctrine and whether he might not be bound by the "outcome" effect of the local court's decision in *Oxendine*. He simply announced his disagreement with the highest court of the District of Columbia, although he acknowledged (649 F.Supp. at 799) that its *Oxendine* decision "accurately summariz[ed] the testimony."

He refused to accept that decision, stating instead that he agreed with the decision (of the trial judge) that had been reversed.

The Circuit Court did mention the *Erie* doctrine, but just barely. In footnote 9 of its opinion, 857 F.2d at 825, p. A-4–6, the Circuit Court said that plaintiffs' "*Erie* challenge must be rejected," giving several reasons. Its first reason was that plaintiffs' argument "ignores the differences in the evidence presented in the two cases." (This is, as has been said, directly contrary to the statement of the District Judge that there were essentially no differences.) The next reason given by the Circuit Court was that "the *Erie* doctrine applies to state *substantive*, not *procedural*, law to be followed by federal courts exercising diversity jurisdiction." And finally, the Circuit Court said: "In addition, it is clear that *Erie* does not affect the federal courts' application of the Federal Rules of Evidence. . . . Because the admissibility of evidence, which is governed by the Federal Rules of Evidence, is the crux of our decision in this case, . . . the Richardsons' argument must be rejected."

This diversity case thus suffered a different outcome in the federal court system than would have been the case in the local court system—a cruel irony, when we consider that this *Richardson* case actually was originally filed in the Superior Court of the District of Columbia, where it would have been unquestionably controlled by *Oxendine*, and was removed to the federal district court.

REASONS FOR GRANTING THE WRIT

1. The Erie Railroad Issue

The fundamental principle of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938),[1] is that in cases (such as this diversity case) involving state law, the outcome of the suit "in a federal court instead of in a state court a block away, should not lead to a substantially different result." *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109 (1945). Indeed, "a federal court adjudicating a state-created right solely because of the diversity of citizenship of the parties is for that purpose, in effect, only another court of the State." *Id.* at 108.

Yet here, the local court system had (prior to the District Court's decision) ruled upon virtually this same case, with a totally different result. The District Judge acknowledged that fact; he said: "This case is a virtual reprise of *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100 (D.C. 1986)," and he said he had heard, in this case, "substantially the same evidence as the trial judge in *Oxendine*." *Richardson v. Richardson-Merrell, Inc.*, 649 F.Supp. 799 (D.D.C. 1986). But, he complained, the District of Columbia Court of Appeals reversed the trial judge's grant of judgment N.O.V. "in an opinion which, although accurately summarizing the testimony, did not address the significance of certain evidence bearing upon the current state of scientific knowledge." *Id.* at 799. He paid no deference at all to the decision of the highest court of the District of Columbia and proceeded to hold to the contrary.

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[1] *Erie Railroad* is applicable in the federal courts of the District of Columbia. See *Anchorage-Hynning & Co. v. Moringiello*, 697 F.2d 356 (D.C. Cir. 1983); *Steorts v. American Airlines, Inc.*, 647 F.2d 194 (D.C. Cir. 1981).

The Court of Appeals at least recognized the existence of an *Erie Railroad* factor but held that *Erie* did not apply. See 857 F.2d at 825 (p. A-4), note 9. It gave three reasons. Its first reason was that there are "differences in the evidence presented in the two cases." This is not tenable; the District Judge, who heard the evidence, said that it was "substantially the same evidence."

The Court's second reason was that "the *Erie* doctrine applies to state *substantive*, not *procedural*, law. . . ." By inference, we gather that the Court is saying that what we have here is "procedural" law. It is true that as a kind of shorthand, we talk about *Erie* as applying only to "substance" as against "procedure," but as this Court said in *Hanna v. Plumer*, 380 U.S. 460, 469(1965): "The line between 'substance' and 'procedure' shifts as the legal context changes." And the Court then quoted from *Guaranty Trust Co. of New York v. York*, supra, 326 U.S. at 108: "Each implies different variables depending upon the particular problem for which it is used." Here, the treatment of the evidence by the Circuit Court of Appeals was *substantively* in conflict with that of the District of Columbia Court of Appeals. The crux of the *Erie* problem here is this ruling of the Court below (857 F.2d at 830, p. A-16):

> These three types of studies then—chemical, *in vitro*, and *in vivo*—cannot furnish a sufficient foundation for a conclusion that Bendectin caused the birth defects at issue in this case. *Studies of this kind, singly or in combination, are not capable of providing causation* in human beings in the face of the overwhelming body of contradictory epidemiological evidence. (Emphasis added)

This is precisely to the contrary of what the highest court of the local court system held *on this very issue, and on the same evidence*. In the *Oxendine* case, the D.C. Court of Appeals held (506 A.2d at 1110):

> In ruling on a motion for judgment N.O.V., the court must view the evidence as a whole, not in fragments. Like the pieces of a mosaic, the individual studies showed little or nothing when viewed separately from one another, but they combined to produce a whole that was greater than the sum of its parts: a foundation for Dr. Done's opinion that Bendectin caused appellant's birth defects.

The D.C. Court of Appeals went on to say, with regard to Dr. Done:

> The evidence also established that Dr. Done's methodology was generally accepted in the field of teratology, and his qualifications as an expert have not been challenged. Because he fully explained to the jury that his opinion was based on *all* of the studies, we cannot say that no reasonable juror could reach a verdict in favor of appellant.

We have then a square conflict on the sufficiency of the evidence to support a jury verdict. *The case turned on this difference,* and came out with a different result in the federal court. By whatever label we choose to attach, this is an *Erie Railroad* issue. The *Oxendine* decision articulated the local law of the District of Columbia.

We pause to say what this issue is *not*. This is not a case in which there is a federal "affirmative countervailing consideration" such as whether or not to afford trial by jury, as in *Byrd v. Blue Ridge Rural Electric Corp., Inc.*, 356 U.S. 525 (1958). This is not a case of a conflict of the *Erie* doctrine with the Federal Rules of Civil Procedure, as in *Hanna v. Plumer,* supra. This is not a case involving whether the sufficiency of evidence is to be tested by a "federal" standard or a "state" standard—see, e.g., *Dick v. New York Life Ins. Co.*, 359 U.S. 437, 444-5 (1959). This

case is controlled by *Stoner v. New York Life Ins. Co.* 311 U.S. 464 (1940), which held specifically that (in a case in which the factual issue was whether the insured was disabled within the meaning of the insurance policy) it was error for the federal court to refuse to follow the ruling of a state court which had held that, as to the same insured and the same insurance policy, the evidence *was* sufficient to create a jury issue as to the fact of disability.

No one has suggested that the *standard* in the local court system of the District of Columbia is different from the standard applied in federal courts. This is simply a case involving the outcome of the case, where that outcome in a state court is already known.

This Court should grant certiorari in order to make clear the effect of *Erie Railroad* where a state court has determined a case on the same evidence as is subsequently adduced in a federal diversity case in that state.

2. The Rule 703 and Trial By Jury Issue

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion. . . . If there are any circumstances which permit an exception, they do not now occur to us. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

Rule 703 of the Federal Rules of Evidence was invoked here as a bludgeon by the Court below to justify its action which deprived plaintiffs of trial by jury. That was a misuse of the Rule. On the contrary, that Rule which (as the Court below admitted) "was intended to broaden the ac-

ceptable bases of expert opinion,"[2] reads as follows:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, *the fact or data need not be admissible in evidence*. (Emphasis added)[3]

The eight experts who testified on behalf of plaintiffs all testified that the evidence they presented was of the type generally and reasonably relied upon by experts in the particular field in forming opinions on the subject, and thus within Rule 703. And defendants' experts agreed with this! But the Court below held that it is the judge, and not the jury, who is empowered to pass upon whether or not expert opinions so qualified. These questions, said the Court, "are matters of law for the court to decide." 857 F.2d at 829, p. A-13, infra.

This is directly contrary to what other circuits have held. Both the Fifth Circuit and the Third Circuit have held that in determining under Rule 703 whether an expert's opinion is "of a type reasonably relied upon by experts in the particular field" the trial court "should defer to the expert's opinion of what data they [sic] find reasonably reliable." *Peteet v. Dow Chemical Co.*, 868 F.2d 1428, 1432 (5th Cir. 1989), citing *Greenwood Utils. Comm'n v. Mississippi Power Co.*, 751 F.2d 1484, 1485 (5th Cir. 1985), and *In re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 277 (3rd Cir. 1983), rev'd on other grounds, 475 U.S. 574 (1986).

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[2]*Merit Motors, Inc. v. Chrylser Corp.*, 569 F.2d 666, 673 (D.C. Cir. 1977), quoted by the Court below, 857 F.2d at 829, p. A-14.

[3]The emphasized provision, which relieved litigants of the necessity of showing admissibility in evidence, was "the most controversial" aspect of Rule 703 (and possibly of the Rules as a whole). 11 *Moore's Federal Practice* (1989) p. VII-49.

The Court below said that the question of Bendectin's alleged effects "is scientific in nature, and it is to the scientific community that the law must look for the answer." 857 F.2d at 829, p. A-12. The Court then proceeded to hold that the opinion of one of plaintiffs' scientific witnesses "lacks an adequate basis" (and the Court threw in, for good measure, the opinions of plaintiffs' seven other experts) because it is a profoundly minority view. But this is contrary to the holding of the Fifth Circuit in *Osburn v. Anchor Laboratories, Inc.*, 825 F.2d 908, 915 (1987), that

> An expert's opinion need not be generally accepted in the scientific community before it can be sufficiently reliable and probative to support a jury finding. . . . What is necessary is that the expert arrived at his causation opinion by relying on *methods* that other experts in his field would reasonably rely on in forming their own, possibly different opinions, about what caused the patient's disease.

The Third Circuit, in the *Japanese Electronic Products Litigation* case, supra, articulated the proper approach. There, the District Judge, using his own criteria, excluded expert testimony precisely on the ground that it was not "of a type reasonably relied upon by experts in the particular field in forming opinions." The Court of Appeals reversed, saying (723 F.2d at 276):

> The proper inquiry is not what the court deems reliable, but what experts in the proper discipline deem it to be . . .

Thus, said the Third Circuit (p. 277), the District Court was in error insofar as it "substituted its own views of reasonable reliance for those of the experts."

There was no dispute, in the case at bar, as to the propriety of plaintiffs' *methodology.* Defendant's experts agreed that it was proper. Indeed, in Bendectin litigation itself, where this very issue was raised in the Sixth Circuit in *In Re: Bendectin Litigation,* 857 F.2d 290 (1988), the Sixth Circuit said:

> In reviewing the record, . . . as we observed earlier, the jury verdict following trial here might have been for the Plaintiffs instead of for the Defendant. (p. 325).
>
> * * * * * *
>
> It is important to observe that the jury, if it credited Dr. Swan's testimony, would plainly have understood that it could return a verdict for the Plaintiffs where Bendectin was one of the proximate causes of the defects. (p. 311, n.14)

We thus have a conflict of circuits on this most important issue—the sufficiency of scientific evidence in jury cases. In the Sixth Circuit (as in the D.C. Court of Appeals), a plaintiff creates a jury issue by presenting the testimony of qualified scientific experts on the question of Bendectin causation. But in the Circuit Court below, that same evidence is held to be insufficient.

In holding that the testimony of plaintiffs' experts did not rise scientifically to an acceptable level of admissible evidence, the Court below weighed the evidence. It thereby acted in direct violation of the historic mandate of this Court expressed recently in *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255 (1986):

> *Credibility determinations, the weighing of the evidence,* and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. (Emphasis added)

This statement summarizes the long-time holdings of this Court, see *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970), and the D.C. Circuit has often recognized it.[4] But the decision at bar, though purporting to follow those holdings, has invented a way around them, doing away with the right of trial by jury in the process. The Court held that the "question whether Bendectin causes limb reduction defects is scientific in nature, and it is to the scientific community that the law must look for the answer," 857 F.2d at 829, p. A-12, but then—in this jury case—the Court held that it is the function of the *judge*, not the jury, to decide that question.

Presumably this would have been the Circuit Court's position even if plaintiffs had produced not eight but one hundred or one thousand experts testifying that Bendectin is a teratogen and caused plaintiff's birth defects.[5] Under that Court's formulation of the principle involved, a judge could always foreclose a jury's consideration of what the "scientific community" had determined.

The correct principle was set forth by the Court below in its decision of only five years ago, *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), cert. den. 469 U.S. 1062 (1984), when it said, p. 1534, that

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[4]See *Kozup v. Georgetown University*, 851 F.2d 437, 439 (D.C. Cir. 1988). Indeed, the Court below said, in this very case, 857 F.2d at 827: "The Court must consider all of the evidence offered by the parties, but *it should neither assess witness credibility nor weigh the evidence*." (Emphasis added)

[5]The Court below said, footnote 38, p. A-13, that "the number of experts presented does not in itself preclude a finding that there was insufficient evidence or automatically create an issue for the jury." Its treatment of Dr. Done's testimony, said the Court, "subsumes that of the other experts presented on Richardsons' behalf."

> judges . . . have no special competence to resolve the complex and refractory causal issues raised by the attempt to link low level exposure to toxic chemicals with human disease. On questions such as these, which stand at the frontier of current medical and epidemiological inquiry, if experts are willing to testify that such a link exists, it is for the jury to decide whether to credit such testimony.

The decision below has sent shivers across the country among members of the bar. It has thrown into doubt the continuing role of the jury in a case involving scientific controversy. Already another Court of Appeals has utilized the approach of the Court below to reverse a jury verdict and entry of judgment for plaintiffs in another Bendectin case, holding that the court could find insufficient the testimony of numerous qualified scientific experts that this drug caused plaintiff's birth defects. *Brock v. Merrell Dow Pharmaceuticals, Inc.*,—F.2d—(5th Cir. June 6, 1989).

CONCLUSION

This Court should grant certiorari to clarify the effect of *Erie Railroad v. Tompkins* and of the Seventh Amendment in cases such as this.

Respectfully submitted,

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APPENDIX

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued September 10, 1988 Decided September 27, 1988

Nos. 87-7023 and 87-7024

CARITA RICHARDSON, Infant, by S. & E. Richardson, Guardians, *et al.*, APPELLANTS

v.

RICHARDSON-MERRELL, INC., a Delaware Corporation, *et al.*

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 83-03505)

Barry J. Nace, with whom *Thomas H. Tate*, *Lynn S. Spradley*, *Irving R. M. Panzer* and *Timothy D. Junkin* were on the brief, for appellants.

Mark L. Austrian, with whom *John B. Williams* and *Frederick D. Baker* were on the brief, for appellee.

Geoffrey R. W. Smith and *Bruce J. Brennan* were on the brief for Pharmaceutical Manufacturers Association, amicus curiae, urging affirmance.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before ROBINSON, SILBERMAN and D. H. GINSBURG, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* ROBINSON.

ROBINSON, *Circuit Judge*: Carita Richardson and her parents brought an action in the District Court alleging that her congential limb defects resulted from ingestion of Bendectin by her mother, Etheleen, during her pregnancy. At the time, Bendectin, an anti-nausient drug, was manufactured by Richardson-Merrell, Inc., which since has been succeeded by Merrell-Dow Pharmaceuticals, Inc. Following a lengthy trial, the jury returned a verdict awarding damages in the sums of $1 million to Carita and $160,000 to the parents. On Merrell's motion, the District Court granted judgment n.o.v. in its favor, and the propriety of doing so is the single question on this appeal. After careful consideration of the record, we agree that the evidence was so one-sided as to warrant fully the court's action. Accordingly, we affirm.

I. THE BACKGROUND

The Bendectin taken by Mrs. Richardson was a combination of pyridoxine hydrochloride (vitamin B-6), doxylamine succinate (an antihistamine), and dicyclomine hydrochloride (an antispasmodic).[1] In 1956, the drug was approved by the Federal Drug Administration (FDA) as safe for the treatment of nausea and vomiting during pregnancy. Between 1957, when Bendectin was initially marketed, and 1983, when Merrell discontinued marketing of the drug—apparently as the result of litigation—Bendectin was used by more than thirty million pregnant women. FDA approval has never been rescinded.

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[1] Dicyclomine hydrochloride was dropped from the formulation of Bendectin in 1976.

Early in her pregnancy,[2] Mrs. Richardson developed morning sickness, the nausea that pregnant women sometimes suffer. On her doctor's prescription, she began taking two Bendectin tablets at night and one in the morning. That she continued to do for at least the duration of the period of organogenesis—from about the 24th through the 56th day post-conception—the time during which Carita's limbs were forming in utero. Sadly, Carita was born with limb-reduction defects.[3]

A. *The Procedural History*

Carita and her parents filed suit in the District Court for the District of Columbia. Along with over 1,500 other Bendectin lawsuits, the case was transferred for pretrial proceedings, pursuant to an order of the Judicial Panel on Multidistrict Litigation, to the Southern District of Ohio,[4] where a jury trial was held on the common issue of causation for all plaintiffs who had not opted out.[5] Because the Richardsons elected not to participate in the common-issues trial, their case was retransferred to the District Court here.

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[2] Richardson, then age 38, had three other children, all of whom were born without birth defects.

[3] Carita's left arm was deformed, with an underdeveloped humerus fused to the radius at the elbow and terminating in a hand with only two digits. Her right arm was normal. The right and left femurs were underdeveloped. Her lower left leg was normal, but she had no lower right leg at all. An appendage resembling a foot was attached to her right hip, and later was amputated.

[4] *In re Richardson-Merrell, Inc. "Bendectin" Prods. Liab. Litig. (No. II)*, 533 F.Supp. 489 (J.P.M.D.L. 1982).

[5] The trial involved more than a thousand plaintiffs and resulted in a finding by the jury that Bendectin did not cause birth defects. *In re Richardson-Merrell, Inc. "Bendectin" Prods. Liab. Litig.*, 624 F.Supp. 1212 (S.D. Ohio 1985) (M.D.L. No. 486), *aff'd in part, vacated in part, and remanded with directions sub nom. In re Bendectin Litig.*, No. 85-3858 (6th Cir. Aug. 30, 1988), 857 F.2d 290.

At trial, to avoid a compromise verdict, the District Court submitted the case to the jury in two stages, first on the issue of causation and then on issues of failure to warn and damages. The jury found that Bendectin was a human teratogen, a substance capable of causing birth defects, when taken in recommended doses by a pregnant woman during the period of organogenesis of a unborn child and that Bendectin was the proximate cause of Carita's birth defects. The jury also found a lack of proper warning of the dangers associated with the drug, and accordingly, returned its $1.16 million verdict for the Richardsons.

Merrell moved for judgment n.o.v. or, in the alternative, for a new trial. The court granted the motion for judgment n.o.v., holding that on the basis of the evidence presented no reasonable jury could find that Carita's birth defects were more likely than not caused by Bendectin.[6] Alternatively, the court granted Merrell's motion for a new trial [7] on the ground that the verdict was "clearly contrary to the weight of the evidence." [8]

The Richardsons argue that the District Court erred in both respects because there was sufficient credible evidence to support the verdict in their favor.[9] Merrell con-

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[6] *Richardson* v. *Richardson-Merrell, Inc.*, 649 F. Supp. 799, 799 (D.D.C. 1986) [hereinafter *Richardson*].

[7] The court's action in this regard was in conformity with the procedure specified by Rule 50(c)(1) of the Federal Rules of Civil Procedure: "If the motion for judgment notwithstanding the verdict . . . is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial."

[8] *Richardson, supra* note 6, 649 F.Supp. at 799-800.

[9] The Richardsons also assert that because this is a diversity case, the District Court disregarded the teaching of *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188

tends that judgment n.o.v. was proper because the opinions of the Richardsons' experts were inadequate to demonstrate causation by a preponderance of the evidence.

(1938), by reaching a result different from that arrived at by the District of Columbia Court of Appeals in *Oxendine* v. *Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100 (1986), a Bendectin case in which substantially similar evidence was presented. There, as here, judgment n.o.v. had been granted following a jury verdict adverse to Merrell, but the Court of Appeals reversed on the ground that there was sufficient evidence to support the verdict.

In taking account of that decision, the District Court in this case concluded that although the *Oxendine* court summarized accurately the testimony presented, it "did not address the significance of certain evidence bearing upon the current state of scientific knowledge"—evidence elaborately presented in the case at bar. It was the District Court's view that the Court of Appeals in *Oxendine* had "judicially reopened an esoteric 20-year-old controversy which is by now essentially settled within the scientific community." *Richardson, supra* note 6, 649 F.Supp. at 799.

Subsequent to oral argument in the case at bar, the defendant in *Oxendine* moved for relief from the judgment, and retrial of the case was ordered. *Oxendine* v. *Merrell Dow Pharmaceuticals, Inc.*, Civ. No. 1245-82 (Super. Ct. D.C. Feb. 12, 1988) (memorandum order). An appeal from that ruling is now pending before the Court of Appeals, leaving unsettled the ultimate outcome in *Oxendine* and the decisional foundation thereof. But whatever the fate of *Oxendine* may be, the Richardsons' *Erie* challenge must be rejected. We note that the Richardsons' argument ignores the differences in the evidence presented in the two cases. Moreover, the *Erie* doctrine applies to state *substantive*, not *procedural*, law to be followed by federal courts exercising diversity jurisdiction. See, e.g., *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945). In addition, it is clear that *Erie* does not affect the federal courts' application of the Federal Rules of Evidence. *Eli Lilly & Co.* v. *Home Ins. Co.*, 254 U.S. App.D.C. 1, 6, 794 F.2d 710, 715 (1986); see also C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 4512 (1982). Because the admissibility of testimony, which is governed by the Federal Rules of Evidence, is the crux of our de-

After an exhaustive review of the trial transcript and the exhibits introduced by the parties, we conclude that judgment n.o.v. was appropriate.

B. *The District Court's Opinion*

In granting judgment n.o.v., the District Court stated:

> No reasonable jury could find on the basis [of the evidence presented] that this infant plaintiff's birth defects were more likely than not to have been caused by her intrauterine exposure to Bendectin; alternatively, even if such a finding were reasonable, it is nevertheless so clearly contrary to the weight of the evidence that the case must be retried.[10]

The court summarized the evidence, focusing on the testimony of Dr. Alan K. Done, the Richardson's principal witness on causation. On the basis of (1) Bendectin's chemical structure, (2) *in vitro* (test tube) studies, (3) *in vivo* (animal) teratology studies conducted by Merrill and others, and (4) the "human data" he had reviewed—epidemiological studies which he found "defective, inconclusive, or both" [11]—Dr. Done expressed the opinion that "to a 'reasonable degree of medical certainty,' Bendectin was not only 'capable' of causing birth defects in humans, but that it had, in fact, caused those limb defects with which Carita Richardson had been born." [12]

Despite this opinion, the court held that there was no "battle of experts" in this case, a circumstance which,

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cision in this case, see *infra* notes 37-42 and accompanying text, the Richardsons' argument must be rejected.

Appellants also challenge the District Court's alternative grant of a new trial. Our disposition, however, makes it unnecessary for us to reach this issue.

[10] *Richardson, supra* note 6, 649 F.Supp. at 799.

[11] *Id.* at 801. Epidemiology is the study of the frequency of disease in human populations and the way in which the frequency varies from one population to another.

[12] *Id.*

if true, would have required that the verdict remain standing.[13] The court apparently concluded that there was not an adequate foundation for Dr. Done's theory on Bendectin, a theory undermined by an overwhelming array of contrary opinion published in the scientific literature and presented by the defense.

The District Court also examined closely the testimony of Dr. Raymond Seltser, an expert witness for the defense, who testified about the significance of the scientific literature on Bendectin. Dr. Seltser's review of the literature uncovered fourteen cohort studies and seven case control studies, "in none of which is there to be found a statistically significant increase in the relative risk of any congential limb malformations associated with Bendectin exposure." [14] By the court's estimate, "the importance of [Dr. Seltser's] testimony lies in his presentation of the totality of the published scientific literature [on Bendectin], which collectively represents the sum of all that can be said to be scientifically 'known' of the matter at present." [15] The court added:

> Excepting their own empirical observations, the "literature" is to scientists both the ultimate authority as to and the most respected repository of scientific knowledge. And the literature on Bendectin, individually and in the aggregate, fails to demonstrate Bendectin's teratogenicity to a scientifically acceptable degree of accuracy.[16]

The District Court observed that Dr. Done had neither performed his own studies nor published his criticisms

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[13] *Id.* at 801-802; see *Ferebee* v. *Chevron Chem. Co.*, 237 U.S.App.D.C. 164, 170, 736 F.2d 1529, 1535 (1984) ("[t]he case was thus a classic battle of the experts, a battle in which the jury must decide the victor").

[14] *Richardson, supra* note 6, 649 F.Supp. at 802 n.9.

[15] *Id.* at 802.

[16] *Id.*

of the studies performed by others, but nonetheless testified in contradiction to "not only Dr. Seltser but to the findings of all those researchers who have studied and published in the twenty-odd years since the investigation of Bendectin began." [17]

The District Court also noted that Dr. Seltser's judgment regarding the current state of knowledge about Bendectin within the scientific community was corroborated by FDA's Fertility and Maternal Health Drugs Advisory Committee, which was convened in 1980 to evaluate the evidence on alleged Bendectin-related malformations.[18] After studying the literature and considering testimony presented during a two-day hearing, the Committee concluded that there was no increased incidence of birth defects among Bendectin-exposed infants; that there was no need for further animal or epidemiological studies; and that Bendectin should not be withdrawn from the market.[19] FDA adopted the findings of the Committee and has not since changed its position.[20]

The District Court concluded that in light of Bendectin research and the published literature, Dr. Done's opinion was beyond the range of acceptability. The court's summary of its analysis is succinct:

> Though Dr. Done might disagree, there is now nearly universal scientific consensus that Bendectin has not been shown to be a teratogen, and, the issue being a scientific one, reasonable jurors could not reject that consensus without indulging in precisely the same speculation and conjecture which the multiple investigations undertook, but failed, to confirm. That Dr. Done remains an unbeliever and was will-

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[17] *Id.*

[18] *Id.* at 802-803.

[19] *Id.*

[20] *Id.*

> ing to testify to his disbelief "with reasonable medical certainty" does not mandate that this case be left as the jury decided it. Wihout a genuine basis "in or out of the record," even his expert "theoretical speculations" are insufficient to sustain the plaintiff's burden of proving, by a preponderance of the evidence, that Bendectin not only causes congenital defects generally, but that, in particular, it caused those limb reduction defects with which Carita Richardson was most unfortunately born.[21]

As a result, the court granted Merrell's motion for judgment n.o.v.

II. Standard of Review

The standard for awarding judgment n.o.v. is the same as that governing rulings on motions for directed verdicts.[22] Judgment n.o.v. is proper only if, viewing the evidence in the light most favorable to the plaintiff and giving him the advantage of every fair and reasonable inference that the evidence may permit, there can be but one reasonable conclusion drawn.[23] "If fair-minded people may differ as to the conclusion, or if there is substantial conflicting evidence," we have said, "the judgment n.o.v. motion must be denied."[24] The court must

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[21] *Id.* at 803 (citing *Merit Motors, Inc.* v. *Chrysler Corp.*, 187 U.S.App.D.C. 11, 18, 569 F.2d 666, 673 (1977)).

[22] *Coburn* v. *Pan Am. World Airways*, 229 U.S.App.D.C. 61, 64, 711 F.2d 339, 342 (1983); *Vander Zee* v. *Karabatsos*, 191 U.S.App.D.C. 200, 203, 589 F.2d 723, 726 (1978).

[23] *Carter* v. *Duncan-Huggins, Ltd.*, 234 U.S.App.D.C. 126, 128, 727 F.2d 1225, 1227 (1984); *Coburn* v. *Pan Am. World Airways, supra* note 22, 229 U.S.App.D.C. at 64, 711 F.2d at 342; *Metrocare* v. *Washington Metro. Area Transit Auth.*, 220 U.S.App.D.C. 104, 106, 679 F.2d 922, 924 (1982); *Vander Zee* v. *Karabatsos, supra* note 22, 191 U.S.App.D.C. at 203, 589 F.2d at 726.

[24] *Carter* v. *Duncan-Huggins, Ltd., supra* note 23, 234 U.S. App.D.C. at 128, 727 F.2d at 1227.

consider all of the evidence offered by the parties, but it should neither assess witness credibility nor weigh the evidence.[25] On appeal, this court's review of the action taken on such a motion stress the same course as that binding on the District Court when it considered the motion beforehand.[26] "Because a motion for judgment n.o.v. intrudes upon the jury's domain, that question is very narrow." [27]

Recently, in *Anderson* v. *Liberty Lobby, Inc.*,[28] a summary judgment case, the Supreme Court clarified the standard for determining when it is appropriate to take a case from the jury.[29] *Anderson* was a libel action in

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[25] *Id.* at 128-129, 727 F.2d at 1227-1228.

[26] *Id.* at 128, 727 F.2d at 1227.

[27] *Id.* It is of no moment that the District Court granted judgment n.o.v. instead of taking the case from the jury earlier by directing a verdict for Merrell. We have frequently counseled that "the better practice in such situations is to let the case go to the jury and, if it finds liability, to set [the verdict] aside." *Law* v. *Virginia Stage Lines, Inc.*, 144 U.S. App.D.C. 115, 116-117, 444 F.2d 990, 991-992 (1971); see also *Peigh* v. *Baltimore & O. R.R.*, 92 U.S.App.D.C. 198, 202, 204 F.2d 391, 396 (1953) ("if there is room for a difference of opinion, the wise course is for the trial judge to allow the case to go to the jury. If a verdict is deemed by the court to be contrary to the evidence, judgment may be entered *non obstante veredicto*").

[28] 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

[29] The Court noted that the standard for direction of a verdict mirrors the standard for summary judgment, and that action in either instance is proper "if, under the governing law, there can be but one reasonable conclusion as to the verdict." *Id.* at 250, 106 S.Ct. at 2511, 91 L.Ed.2d at 213. The Court pointed out that " '[t]he primary difference between the two motions is procedural; summary judgment motions are usually made before trial and decided on documentary evidence, while directed verdict motions are made at trial and decided on the evidence that has been admitted,' " *id.* at 251, 106 S.Ct. at 2515, 91 L.Ed.2d at 214 (quoting *Bill Johnson's*

which the Court reversed this circuit's holding that the clear-and-convincing evidentiary standard need not be taken into consideration at the summary judgment stage. "[W]e are convinced," the Court explained, "that the inquiry involved in a ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." [30] In a run-of-the-mill civil case, the Court noted, "[t]he judge's inquiry . . . unavoidably asks whether reasonable jurors could find by a preponderance of the evidence that the plaintiff is entitled to a verdict." [31] Thus, the Court concluded that "the judge must view the evidence presented through the prism of the substantive evidentiary burden." [32]

The Court, citing long-established precedent, pointed out that a judge is not required to submit a case to the jury " 'merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party.' " [33]

Restaurants, Inc. v. *NLRB*, 461 U.S. 731, 745 n.11, 103 S.Ct. 2162, 2171 n.11, 76 L.Ed.2d 277, 290 n.11 (1983)), but that "[i]n essence, though, the inquiry under each is the same: whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law," 477 U.S. at 251-252, 106 S.Ct. at 2515, 91 L.Ed.2d at 214. Because the identical standard governs a court's ruling on a motion for judgment n.o.v., *Coburn* v. *Pan Am. World Airways, supra* note 22, 229 U.S.App.D.C. at 64, 711 F.2d at 342; *Vander Zee* v. *Karabatsos, supra* note 22, 191 U.S.App.D.C. at 203, 589 F.2d at 726; see also *Lester* v. *Dunn*, 154 U.S.App.D.C. 399, 401, 475 F.2d 983, 985 (1973), the *Anderson* decision provides guidance in this case as well.

[30] 477 U.S. at 252, 106 S.Ct. at 2512, 91 L.Ed.2d at 214.

[31] *Id.*

[32] *Id.* at 254, 106 S.Ct. at 2513, 91 L.Ed.2d at 215.

[33] *Id.* at 251, 106 S.Ct. at 2511, 91 L.Ed.2d at 213 (quoting *Improvement Co.* v. *Munson*, 81 U.S. (14 Wall.) 442, 448, 20 L.Ed. 867, 872 (1872)).

"If the evidence is merely colorable, or is not significantly probative," the Court stated, "summary judgment may be granted." [34] Thus, the question for us is not whether there was *some evidence*,[35] but whether, in terms of "the actual quantum and quality of proof necessary to support liability," [36] there was *sufficient evidence* upon which a jury coud properly base a verdict for the Richardsons. They, as plaintiffs, had the burden of proving by a preponderance of the evidence that Bendectin was capable of causing birth defects of the types Carita Richardson suffered. To survive a motion for judgment n.o.v., the evidence they introduced had to be more than merely colorable; it must have been significantly probative if the jury's verdict is to stand.

III. The Evidence

The question whether Bendectin causes limb reduction defects is scientific in nature, and it is to the scientific community that the law must look for the answer. For

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[34] 477 U.S. at 249-250, 106 S.Ct. at 2511, 91 L.Ed.2d at 212 (citations omitted); see also *First Nat'l Bank* v. *Cities Serv. Co.*, 391 U.S. 253, 290, 88 S.Ct. 1575, 1593, 20 L.Ed.2d 569, 592-593 (1968) (in face of defendant's properly supported motion for summary judgment, plaintiff cannot get to the jury without "any *significant probative evidence* tending to support the complaint") (emphasis added); accord, *Merit Motors, Inc.* v. *Chrysler Corp.*, *supra* note 21, 187 U.S.App. D.C. at 14, 569 F.2d at 669.

[35] The scintilla rule has long been abolished in this circuit. *Baltimore & O. R.R.* v. *Postom*, 85 U.S.App.D.C. 207, 208, 177 F.2d 52, 54 (1949).

[36] 477 U.S. at 254, 106 S.Ct. at 2513, 91 L.Ed.2d at 215. The Court stressed that its holding did not denigrate the role of the jury. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge," whether the motion is for a summary judgment or a directed verdict. *Id.* at 255, 106 S.Ct. at 2513, 91 L.Ed.2d at 216.

this reason, expert witnesses are indispensable in a case such as this. But that is not to say that the court's hands are inexorably tied, or that it must accept uncritically any sort of opinion espoused by an expert merely because his credentials render him qualified to testify. The District Court ruled that Dr. Done's opinion lacked "a genuine basis, 'in or out of the record,'" and that his "theoretical speculations" could not sustain the Richardsons' burden of proving causation.[37] Whether an expert's opinion has an adequate basis, and whether without it an evidentiary burden has been met, are matters of law for the court to decide. We conclude that Dr. Done's opinion lacks an adequate basis and therefore, whether viewed alone or in conjunction with those of the other experts,[38] did not provide the "substantial probative evidence" that would require us to leave the verdict as the jury rendered it.

Federal Rule of Evidence 703 lays the foundation for our consideration of what constitutes adequate expert testimony.[39] That rule provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may

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[37] *Richardson, supra* note 6, 649 F.Supp. at 803.

[38] Despite appellant's suggestion, Brief for Appellant at 5, 40, the number of experts presented does not in itself preclude a finding that there was insufficient evidence or automatically create an issue for the jury. To create such an issue, an expert must be qualified to testify as to causation and the opinion given must have an adequate foundation. Our treatment of Dr. Done's testimony subsumes that of the other experts presented on Richardsons' behalf. See notes 40-55 *infra* and accompanying text.

[39] Other relevant rules are Fed. R. Evid. 702, which permits admission of expert testimony only if it will assist the trier of fact, and Fed. R. Evid. 403, which allows the trial court to exclude testimony if it is misleading or confusing, or if its probative value is outweighed by considerations of prejudice, confusion, or waste of time.

> be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

As we have heretofore stated, Rule 703 "was intended to broaden the acceptable bases of expert opinion, but it was not intended . . . to make summary judgment impossible whenever a party has produced an expert to support its position;" [40] rather, we emphasized, "the grounds relied on by an expert must be 'a type reasonably relied upon by experts in the particular field.'" [41] Similarly, it has been held that a scientific causation issue may be removed from the jury on a motion for a directed verdict if the evidence only "provides a 'mere possibility' yet not a 'probability' of proof." [42]

We must therefore look behind Dr. Done's ultimate conclusion that Bendictin causes birth defects and analyze the adequacy of its foundation. Dr. Done predicated his opinion upon four different factors: (1) chemical structure acitvity analysis, (2) *in vitro* (test tube) studies, (3) *in vivo* (animal) teratology studies, and (4) epidemiological studies.

In speaking of chemical structure activity analysis, Dr. Done referred to the concept that drugs with similar chemical structures may be expected to have similar properties and produce analogous effects.[43] Dr. Done noted the similarity of the chemical structures of doxylamine succinate, the antihistamine component of Ben-

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[40] *Merit Motors, Inc.* v. *Chrysler Corp., supra* note 21, 187 U.S.App.D.C. at 18, 569 F.2d at 673.

[41] *Id.* (quoting Fed. R. Evid. 703).

[42] *Marder* v. *G.D. Searle & Co.*, 630 F.Supp. 1087, 1093-1094 (D. Md. 1986), *aff'd without opinion sub nom. Wheelahan* v. *G.D. Searle & Co.*, 814 F.2d 655 (4th Cir. 1987).

[43] Trial Transcript (Tr.) 797.

dectin, and other antihistamines.[44] He then stated that "it has been known for quite awhile that antihistamines have for the most part, been capable of adversely affecting human development, including causing birth defects at least in animals. The question is not fully answered in humans yet with regard to any specific antihistamine or the group in general, but at least it does *indicate a suspicion.*"[45] As Dr. Done acknowledged, the purpose of analyzing chemical structures is to indicate what other directions a study of a substance should take; in other words, chemical structure activity analysis "gives you a clue," or "raises at least a flag to you indicating that this is a drug that you ought to and must study for teratologic effect because you may be missing something important if you don't."[46] It is thus apparent from Dr. Done's own testimony that the value of chemical structure analysis, standing alone, is extremely limited.

Dr. Done also acknowledged that *in vivo* (animal) teratology studies are similarly of but scant utility in drawing conclusions about whether a substance will cause birth defects in humans. "The fact that [a substance does so] in an animal," he conceded, "doesn't necessarily mean it will in humans, but it does mean, again, that it is likely enough to do so in humans that you have to accept the notion that it will do that unless you prove otherwise. It just increases the need to prove otherwise."[47] Dr. Done further stated that "you know that you are limited in how much you can make of this with regard to humans, but, nonetheless, it is a good place to start."[48] Here, as earlier, Dr. Done acknowledged that

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[44] Tr. 821-822.

[45] Tr. 823 (emphasis added).

[46] Tr. 798.

[47] Tr. 800.

[48] Tr. 799-800.

the *in vivo* studies served merely to raise a suspicion regarding the effect of Bendectin on humans, which by his estimate no other evidence had sufficed to wipe out.[49] Indeed, on cross-examination, Dr. Done agreed that "animal data alone would not be a sufficient bases for you to give an opinion with reasonable medical certainty that Bendectin causes birth defects in humans."[50]

The *in vitro* (test tube) experiments relied on by Dr. Done studied the effects of Bendectin components upon frog nerve fibers and the mesenchyme cells of mouse limb buds for evidence that similar or other defects might occur in humans. Again, the value of such an examination as a predictor of human teratogenicity is extremely meager, and once again we find ourselves in the realm of suspicion. Positive results from *in vitro* studies may provide a clue signaling the need for further research, but alone do not provide a satisfactory basis for opining about causation in the human context.

These three types of studies then—chemical, *in vitro*, and *in vivo*—cannot furnish a sufficient foundation for a conclusion that Bendectin caused the birth defects at issue in this case. Studies of this kind, singly or in combination, are not capable of proving causation in human beings in the face of the overwhelming body of contradictory epidemiological evidence. Perhaps mindful of this, the last type of evidence considered by Dr. Done consisted of the epidemiological studies. When such studies are available and relevant, and particularly when they are numerous and span a significant period of time, they assume a very important role in determinations of questions of causation. Dr. Done himself conceded the import of this literature when he agreed on cross-examination that "in connection with the animal studies . . . because so many substances are teratogenic in animals, before

[49] Tr. 824-825.

[50] Tr. 1104.

you can make a conclusion that a substance is teratogenic in humans, you must look to the human data."[51] Dr. Done also acknowledged the necessity of a statistically significant association between the drug and its effect in human populations:

> Q. . . . Wasn't it true that you would not give an opinion as to causation without a statistically significant association in humans between the ingestion of a drug and a cause of birth defects?
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> A. That is right, not above reasonable degree of medical certainty.
>
> Q. Scientifically—
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> A. That is right.
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> Q. Putting aside medical certainty and what you are testifying here, as a scientist, you could not give an opinion as to causation without a statistically significant relationship in humans between ingestion of the drug and the malformations; isn't that correct, Doctor?
>
> A. That is fair.[52]

Dr. Done further admitted that no one who has published work on Bendectin has concluded that there is a statistically significant association between Bendectin and limb reduction defects of the type at issue in this case.[53] Only by recalculating the data was Dr. Done able to obtain what he deems a statistically significant result.[54] Moreover, the studies rejected by Dr. Done had been published in peer-reviewed scientific journals, while Dr.

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[51] Tr. 1104.

[52] Tr. 1137.

[53] Tr. 1351.

[54] Tr. 1351.

Done has neither published his recalculations nor offered them for peer review.[55]

Since the Richardsons had the burden of proving that Bendectin causes birth defects, the law cannot tolerate a presumption of teratogenicity. That may be prudent in the medical community at the early stages of research where caution is vital and suspicion comes naturally, but it obviously is not acceptable when teratogenicity becomes an issue in a judicial tribunal.

The First Circuit expressed similar concerns in *Lynch* v. *Merrell-National Laboratories Division of Richardson-Merrell, Inc.*,[56] which involved an attempt to link Bendectin to the plaintiff's limb defects. The court noted the growing body of law recognizing the importance of epidemiologic evidence in establishing causation in cases in which no direct evidence is available.[57] The *Lynch* court found that the epidemiological studies on Bendectin concluded overwhelmingly that the drug does not cause birth defects.[58] As a result, the court ruled that Dr. Done's proffered testimony—the same sort of testimony that he

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[55] In *Perry* v. *United States*, 755 F.2d 888 (11th Cir. 1985), proof of causation was found lacking at the trial level. The epidemiological findings of a medical expert regarding a statistical connection were rejected because of the expert's methodology; it was criticized as reflecting the witness' predisposition to arrive at particular conclusions, and as devoid of any peer review of the expert's study. *Id.* at 892. The court found that the testimony of the remaining witnesses was not sufficient to demonstrate causation by a preponderance of the evidence. *Id.* at 893. "Despite appellant's protestations," the court said, "the examination of a scientific study by a cadre of lawyers is not the same as its examination by others trained in the field of science or medicine." *Id.* at 892.

[56] 830 F.2d 1190 (1st Cir. 1987), *aff'g*, 646 F.Supp. 856 (D. Mass. 1986).

[57] *Id.* at 1193-1194.

[58] *Id.* at 1194.

gave in the case at bar—was inadmissible,[59] and affirmed a grant of summary judgment for the defendant.

The Richardsons, however, direct attention to our decision in *Ferebee* v. *Chevron Chemical Co.*,[60] which involved the question whether paraquat exposure caused pulmonary fibrosis. We think reliance thereon is misplaced here. *Ferebee* is an example of "a classic battle of the experts, a battle in which the jury must decide the victor." [61] The defendant attempted to discredit the opinions of the plaintiff's experts on the ground that their views, "while not rejected by the medical community, are sufficiently novel *at this point* to be inadmissible." [62] We said:

> [A] cause-effect relationship need not be clearly established by animal or epidemiological studies before a doctor can testify that, in his opinion, such a relationship exists. As long as the basic methodology employed to reach such a conclusion is sound, . . . products liability law does not preclude recovery until a "statistically significant" number of people have been injured or until science has had the time and resources to complete sophisticated laboratory studies of the chemical.[63]

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[59] Whenever expert testimony lies "at the periphery of what the scientific community considers acceptable, special care should be exercised in evaluating the reliability and probative worth of the proferred testimony under Rules 703 and 403." *In Re "Agent Orange" Prod. Liab. Litig.*, 611 F. Supp. 1223, 1242 (E.D.N.Y. 1985). In mass tort cases where there is no real understanding of the organic cause of the disease or defect, epidemiologic studies are of critical significance. *Id.* at 1239-1240. At least where epidemiological evidence was available, animal studies "are of so little probative force and are so potentially misleading as to be inadmissible." *Id.* at 1241.

[60] 237 U.S.App.D.C. 164, 736 F.2d 1529 (1984).

[61] *Id.* at 170, 736 F.2d at 1535.

[62] *Id.* (emphasis in original).

[63] *Id.* at 170-171, 736 F.2d at 1535-1536.

We noted the possibility that the case may have been the first of its type, or that the plaintiff's doctors may have been the first alert enough to recognize a causal connection between paraquat and pulmonary fibrosis.[64] We observed, too, that the fact that "science would require more evidence before conclusively considering the causation question resolved is irrelevant."[65] Thus *Ferebee* stands for the proposition that courts should be very reluctant to alter a jury's verdict when the causation issue is novel and *"stand[s] at the frontier of current medical and epidemiological inquiry."*[66] If experts are willing to testify to causation in such situations and their methodology is sound, the jury's verdict should not be disturbed.

The case before us, however, is not like *Ferebee*. Indeed, we are at the other end of the spectrum, a great distance from the "frontier of current medical and epidemiological inquiry." And far from a paucity of scientific information on the oft-asserted claim of causal relationship of Bendectin and birth defects, the drug has been extensively studied and a wealth of published epidemiological data has been amassed, none of which has concluded that the drug is teratogenic. Uniquely to this case, the law now has the benefit of twenty years of scientific study, and the published results must be given their just due.

IV. Conclusion

The circumstances of the case are tragic and Carita Richardson's plight evokes the utmost sympathy. It would be foolhardy to expect members of the jury to be without compassion for the catastrophe that befell this family. That is a natural response of the human spirit, and is

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[64] *Id.* at 171, 736 F.2d at 1536.

[65] *Id.*

[66] *Id.* at 169, 736 F.2d at 1534 (emphasis added).

without legal consequence so long as it is properly controlled. But in a case such as this it not only is appropriate but indeed imperative that the court remain vigilant to ensure that neither emotion nor confusion has supplanted reason.

We arrive at our conclusions in this case fully cognizant of and particularly sensitive to the importance of the jury's role in our legal scheme. As in *Stacey* v. *Allied Stores*,[67] an age discrimination case in which a judgment n.o.v. was overturned, we are advertent to "the extraordinary judicial deference owed to jury verdicts in our system of law." [68] We realize that

> [w]e are not to tamper lightly with the considered judgment of those drawn together at one point in time to render a judgment that is representative of the good common sense of the American people. It goes without saying that few institutions are as venerable as that of trial by jury, enshrined at the Founding in the Bill of Rights and hallowed by an enormous body of English and American law that commands judges, who are of all officials the least accountable to the people, not to invade the province of judgment by the people.[69]

In *Stacey*, however, this court "discern[ed] no principled basis for concluding that [the] verdict was infected by prejudice or premised upon surmise, conjecture, or a mere scintilla of evidence." [70] We agree wholeheartedly with the court's sentiments and have no quarrel with the result. Particularly in an age discrimination case such as *Stacey*, the jury is well equipped to evaluate the evidence and use its "good common sense" to come to a

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[67] 247 U.S.App.D.C. 285, 768 F.2d 402 (1985).

[68] *Id.* at 289, 768 F.2d at 406.

[69] *Id.*

[70] *Id.* at 292, 768 F.2d at 409.

reasoned decision. The case at bar, however, is in a different category. The scientific issues are complex, the trial was lengthy, and the evidence and testimony were often difficult to understand. There was an emotional factor at play, a circumstance we are not at liberty to ignore.

It is important to also stress that the District Court's grant of judgment n.o.v. in this case did not usurp the jury's function. Whether an expert's opinion has an adequate basis, and whether without it an evidentiary burden has been carried, are issues of law falling within the province of the court. "[T]he law in its wisdom," we have observed, "has invested trial judges with the power to correct juries who base their verdicts on considerations not embodied in the evidence." [71] In this case, the District Court did exactly that and nothing more.

The judgment appealed from is accordingly

Affirmed.

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[71] *Law* v. *Virginia Stage Lines, Inc., supra* note 27, 144 U.S.App.D.C. at 119, 444 F.2d at 994.

Supreme Court, U.S.
FILED
AUG 4 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARITA RICHARDSON, *et al.*

Petitioners,

v.

RICHARDSON-MERRELL INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Does an opinion of the District of Columbia Court of Appeals, upholding a product liability verdict, mandate that under *Erie* a Federal court sitting in the District of Columbia cannot apply the Federal Rules of Evidence to set aside a plaintiffs' verdict in a different case tried three years later involving the same product and in which substantial additional scientific evidence was presented?

2. May Federal courts determine that proffered expert testimony lacks an adequate scientific basis and is therefore inadmissible under Federal Rules of Evidence 403, 702 and 703?

3. Do Federal courts that find proferred evidence insufficient to sustain a verdict violate the Seventh Amendment right to a jury trial?

CORPORATE AFFILIATIONS OF RESPONDENT

Respondent Richardson-Merrell Inc. (now Merrell Dow Pharmaceuticals Inc.) is a subsidiary of The Dow Chemical Company. Its subsidiaries and affiliates that have securities in the hands of the public are the following:

Alamo Land Company, Inc.; Arabian Chemical Company Limited; Compagnie des Services Dowell Schlumberger; Chief Shipping Company; DCU/LB TRUST; Cromarty Petroleum Company Limited; Chimtrade; Transformadora de Etileno S.A.; Vorakim Kima Sanayi Ve Ticaret A.S.; Dowell Schlumberger Canada, Inc.; Fort Saskatchewan Ethylene Storage Limited Partnership; H-D Tech, Inc.; Wabiskaw Explorations Ltd.; Haeger and Kaessner Limited; Viopal S.A.; Scotdril Offshore Company; Dow Corning Corporation; Dowell Schlumberger Corporation; Dowell Schlumberger Incorporated; El Dorado Terminals Company; Joliet Marine Terminal Trust Estate; M.D. Kasei Limited; Funai Pharmaceuticals Company Ltd.; First Chemical Factoring S.p.A.; Laboratories Industriales Farmaceuticos Ecuatorianos (L.I.F.E.); MDP (Holdings) Ltd.; Fort Saskatchewan Ethylene Storage Corporation; Oronzio de Nora Technologies BV; Pacific Chemicals Berhad; Petroquimica-Dow S.A.; P.T. Pacific Chemicals Indonesia; Vorakim Kimya Sanayi VE Ticaret A.S.; Oronzio de Nora Technologies S.p.A.; Zip Pak Incorporated; Ulsan Pacific Chemical Company Ltd.; Dow Kakoh Kabushiki Kaisha; Family Com.

e Ind. de Productos de Limpeza Ltda.; Oronzio de Nora S.A., (Lugano); Pacific Chemicals (Pakistan) Ltd.; Pacific Plastics (Thailand) Limited; Eurosemences, S.A.; Garit-Essex, A.G.; Pacific Cable Products Sendirian Berhad; The Cynara Company

In addition, it should be noted that a proposed merger of Merrell Dow Pharmaceuticals Inc. and Marion Laboratories, Inc. was announced to the public on July 17, 1989, whereby, if it becomes effective, The Dow Chemical Company would own two-thirds (2/3) of the merged corporation.

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I. STATEMENT OF THE CASE

A. The Opinions Below

Petitioners asserted at trial that Bendectin, a widely prescribed morning sickness medication, was responsible for the infant plaintiff's birth defects.[1] The District Court granted Respondent Merrell Dow Pharmaceutical Inc.'s[2] motion for judgment n.o.v. following a jury verdict in Petitioners' favor. The District Court found that plaintiffs had failed to sustain their burden of proof on the issue of causation, stating:

> [T]here is now nearly universal scientific consensus that Bendectin has not been shown to be a teratogen, and, the issue being a scientific one, reasonable jurors could not reject that consensus without indulging in precisely the same speculation and conjecture which the multiple investigations undertook, but failed, to confirm.

Richardson v. Richardson-Merrell Inc., 649 F. Supp. 799, 803 (D.D.C. 1986).

The Court of Appeals (Circuit Judges Robinson, Silberman and D.H. Ginsburg) unanimously affirmed the

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[1] Bendectin was approved by the Food and Drug Administration ("FDA") in 1956 as safe for the treatment of nausea and vomiting in pregnancy and has been used in over 30 million pregnancies. Merrell Dow voluntarily discontinued marketing Bendectin in 1983 as the result of costs associated with litigation. The medication remains approved by the FDA. No scientist in any peer-reviewed medical or scientific journal, or in any text or reference work has ever concluded that Bendectin causes birth defects.

[2] Merrell Dow Pharmaceuticals Inc. was sued herein under its former name Richardson-Merrell Inc.

District Court's decision based, *inter alia*, upon the application of Rules 403, 702 and 703 of the Federal Rules of Evidence to plaintiffs' expert testimony. *Richardson v. Richardson-Merrell Inc.*, 857 F.2d 823 (1988), *petition for reh'g and suggestion for reh'g en banc denied*, No. 87-7023 (Apr. 6, 1989) ("*Richardson*"). The Court held that while Rule 703 broadens the acceptable basis for an expert's opinion, it does not preclude a Federal court from determining that an expert's opinion lacks a proper foundation. The Court further held that Rule 703 does not prevent a Federal court from reviewing the evidence presented to the jury and concluding that this evidence does not support a jury verdict:

> Whether an expert's opinion has an adequate basis, and whether without it an evidentiary burden has been met, are matters of law for the court to decide.

857 F.2d at 829 (A-13).

Within this evidentiary framework, the Court of Appeals conducted a detailed factual examination of the evidence concerning Bendectin. Dr. Alan K. Done, plaintiffs' principal expert,[3] predicated his opinion that Bendectin causes birth defects upon an analysis of four factors: (1) chemical/structure activity, (2) *in vi-*

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[3] The Court of Appeals focused on Dr. Done's testimony because he was plaintiffs' principal expert witness. As the Court noted, Dr. Done's testimony subsumed the testimony of plaintiffs' other experts. 857 F.2d at 829 n.38 (A-13). Dr. Done was the *only* medical doctor who had reviewed the scientific evidence and had concluded that Bendectin caused the plaintiff's injuries. Petitioners' statement that eight expert witnesses testified that Bendectin caused the infant plaintiff's birth defects (Pet., p.3) is wrong.

tro (test tube) studies, (3) *in vivo* (animal) teratology studies, and (4) epidemiological studies. 857 F.2d at 829 (A-14). The Court examined the evidence supporting each of these factors and held that this evidence, in whole or in part, provided no support for the expert's conclusion that Bendectin caused the child's birth defects. 857 F.2d at 829-30 (A-14). Indeed, with respect to the fourth factor, human epidemiological studies, the Court observed that Dr. Done had admitted that the studies did not show the necessary statistical association between Bendectin and limb defects. 857 F.2d at 831 (A-17). Because Dr. Done's opinion lacked an adequate scientific basis, the Court of Appeals concluded that, under the Federal Rules of Evidence, his opinion could not support the jury's verdict:

> Dr. Done's opinion lacks an adequate basis and therefore, whether viewed alone or in conjunction with those of the other experts, did not provide the "substantial probative evidence" that would require us to leave the verdict as the jury rendered it.

857 F.2d at 829 (A-13).

B. The *Oxendine* Case

The case of *Oxendine v. Merrell Dow Pharmaceuticals Inc.*, 506 A.2d 1100 (D.C. 1986) ("*Oxendine*"), also involved a claim that Bendectin caused birth defects. *Oxendine* was tried in the Superior Court for the District of Columbia in 1983, three years before the *Richardson* trial. During the intervening three-year period substantial additional scientific evidence was accumulated on Bendectin and presented to the *Richardson* jury. (See pages 6-8, *infra*.) This evidence confirmed that Bendectin did not cause birth defects.

Unlike the trial court in *Richardson*, the trial court in *Oxendine* did not admit into evidence many of the epidemiological studies that confirmed the lack of a relationship between Bendectin and birth defects. Unlike the United States Court of Appeals in *Richardson*, the D.C. Court of Appeals in *Oxendine* did not conduct any analysis under evidentiary rules similar to Federal Rules of Evidence 403, 702 or 703 to determine the admissibility of plaintiffs' expert testimony.

The *Oxendine* decision was based in substantial part upon an incorrect application of the United States Court of Appeals for the District of Columbia's decision in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984). The *Oxendine* Court construed *Ferebee* as holding that a jury issue necessarily exists whenever conflicting expert testimony, and a corresponding "battle of the experts", is presented. 506 A.2d at 1104, 1110. In *Richardson* the United States Court of Appeals rejected this construction of its *Ferebee* decision stating that *Ferebee* applies only when the causation issue is novel and "*stand*[*s*] *at the frontier of current medical and epidemiological inquiry*," 857 F.2d at 832 (A-20) (emphasis in original). The *Richardson* Court held that a jury question is not necessarily presented when the issue has been extensively studied and is settled within the scientific community. The *Richardson* Court observed that the facts in *Ferebee* were readily distinguishable from those in *Richardson*:

> And far from a paucity of scientific information on the oft-asserted claim of causal relationship of Bendectin and birth defects, the drug has been extensively studied and a

> wealth of published epidemiological data has been amassed, none of which has concluded that the drug is teratogenic. Uniquely to this case, the law now has the benefit of twenty years of scientific study, and the published results must be given their just due.

857 F.2d at 832 (A-20).

Petitioners also fail to inform the Court that the *Oxendine* decision is not final. A new trial has been ordered based upon a subsequent trial court finding that Dr. Done committed perjury during the *Oxendine* trial. *Oxendine v. Merrell Dow Pharmaceuticals Inc.*, Civ. No. 1245-82 (Super. Ct. D.C. Feb. 12, 1988) (Memorandum Order). An appeal to the D.C. Court of Appeals from this decision is presently pending.

II. REASONS FOR DENYING THE WRIT

A. This Case Raises no *Erie Question*

To create their *Erie* question, Petitioners point to the D.C. Court of Appeals decision in *Oxendine* which they say is binding on this case. Petitioners' position was rejected by the United States Court of Appeals in *Richardson* for three independent reasons: (1) *Erie* does not apply where different evidence is presented, (2) *Erie* does not affect a Federal court's application of the Federal Rules of Evidence, and (3) *Erie* does not apply to procedural issues. 857 F.2d at 825 n.9 (A-4 to 5).[4]

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[4] This case is a particularly inappropriate one in which to render a judicial interpretation concerning the application of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), to the Federal Rules of Evidence because the Rules of Decision Act, 28 U.S.C. § 1652 (1982), does not apply to the District of Columbia. In

1. The Court of Appeals was not Bound by *Oxendine* Because Different Evidence was Presented

The *Oxendine* case was tried in 1983; the *Richardson* case was tried in 1986. During the intervening three years, two large and powerful epidemiological studies were published confirming that Bendectin is not associated with limb defects. These studies were admitted into evidence during the *Richardson* trial. McCredie, J. *et al.*, "The Innocent Bystander: Doxylamine/Dicyclomine/Pyridoxine and Congenital Limb Defects," *Med. J. Australia* 140:525-527 (Apr. 28, 1984) ("McCredie Study") (Tr. 3808-3809; DA. I, Tab 20);[5] Aselton, P. *et al.*, "First-Trimester Drug Use and Congenital Disorders," *Obstet. & Gynec.* 65(4):451-455 (Apr. 1985) ("Aselton Study") (Tr. 3802-3803; DA. I, Tab 10). The McCredie Study states:

> Published reviews of the scientific literature, medico-legal testimony, and a U.S. Food and Drug Administration (FDA) hearing confirmed the epidemiological opinion that there is no evidence of an increase in the frequency of malformations in Bendectin exposed infants.

Palmore v. United States, 411 U.S. 389, 395 (1973), this Court held that the word "state" does not include the District of Columbia unless the statute specifically so provides. The Rules of Decision Act has never been amended to include the District of Columbia. The United States Court of Appeals for the District of Columbia has applied the *Erie* doctrine to diversity cases coming before it solely as a matter of judicial comity. *Lee v. Flintkote Co.*, 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979).

[5] References to "Tr." are to the transcript in the trial court. Citations in the form "D.A. I, Tab" are to documents contained in Respondent's Appendix to its brief in the Court of Appeals.

* * * * *

> Our study provides no evidence that [Bendectin] is implicated in the aetiology of congenital limb defects. It appears to be an innocent bystander in this controversy.

McCredie Study at 525, 527. Neither the McCredie Study nor the Aselton Study were available during the *Oxendine* trial. Numerous other peer-reviewed articles were published after the *Oxendine* trial. None concluded that Bendectin caused birth defects.

In addition to the more recent studies, the record in *Richardson* was significantly more extensive than the record in *Oxendine*. The trial court in *Richardson* admitted into evidence 21 published, peer reviewed epidemiological studies which permitted a complete review of the relevant published material. (D.A. I, Tabs 10-30). In *Oxendine*, the trial court admitted only 3 of these studies, ruling that they would be received into evidence only if the authors were available to testify. Thus, in *Oxendine* most of the then-existing epidemiological studies never became part of the record.

In *Richardson* both the District Court and the Court of Appeals recognized the factual differences between this case and *Oxendine*.[6] The District Court in *Richardson* noted that the D.C. Court of Appeals in *Oxendine* did not "address the significance of certain evidence bearing upon the *current* state of scientific knowledge." 649 F. Supp. at 799 (emphasis added). The Court of Appeals in *Richardson* likewise stated: "[w]e note that the Richardsons' argument ignores

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[6] Petitioners' assertion that the evidence was identical is simply wrong.

the differences in the evidence presented in the two cases." 857 F.2d at 825 n.9 (A-5).

The factual distinctions between the two cases fully justified the *Richardson* Court's determination that no *Erie* issue was presented.

2. The Court of Appeals was not Bound by *Oxendine* Because Federal Courts Must Apply the Federal Rules of Evidence

The Court of Appeals correctly determined that the application of the Federal Rules of Evidence is a procedural matter that presents no *Erie* question:

> In addition, it is clear that *Erie* does not affect the federal courts' application of the Federal Rules of Evidence. *Eli Lilly & Co. v. Home Ins. Co.*, 254 U.S. App. D.C. 1, 6, 794 F.2d 710, 715 (1986); see also C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4512 (1982).

857 F.2d at 825 n.9 (A-5).

Petitioners completely ignore this holding in their Petition—and with good reason. The Federal Rules of Evidence unquestionably govern the admissibility of testimony in Federal courts. Federal courts must remain free to construe the Federal Rules of Evidence, and *Erie* does not alter this fundamental precept. *Hanna v. Plumer*, 380 U.S. 460 (1965).[7] The Court

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[7] The Federal Rules of Evidence stand on even firmer footing than do the Federal Rules of Civil Procedure considered in *Hanna* because they are statutory. Pub. L. No. 93-595, 88 Stat. 1926 (1975). 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4512 (1982); *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 280 (5th Cir.), *cert. denied*, 108 S. Ct. 152

of Appeals correctly noted that the application of the Federal Rules of Evidence involved procedural issues, as to which *Erie* does not apply. 857 F.2d at 825 n.9 (A-5).[8]

The possibility that the application of the Federal Rules of Evidence may cause different results in state and Federal courts does not offend the *Erie* doctrine. The fact that the *Richardson* Court, applying the Federal Rules of Evidence, may have reached an outcome different from that of the D.C. Court of Appeals in *Oxendine* is of no consequence. In *Hanna*, this Court explicitly rejected the rigid outcome-determination analysis urged by the Petitioners. 380 U.S. at 466-69.

3. The Court of Appeals was not Bound by *Oxendine* Because Federal Courts are Entitled to Make Their Own Determinations as to Whether a Jury Issue is Presented

The procedural question concerning the sufficiency of evidence necessary to submit a case to the jury is a matter of Federal, not state, law and, therefore, *Erie* does not apply. 857 F.2d at 825 n.9 (A-4 to 6). A Federal court need not submit an issue to the jury in a diversity case merely because a state court would

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(1987) (in diversity cases the Federal Rules of Evidence govern the admissibility of expert testimony). There is no contention made by Petitioners here or in the Court of Appeals that Congress exceeded its power to regulate Federal courts in enacting these rules.

[8] Moreover, no conflict involving evidentiary rules exists between *Richardson* and *Oxendine* because the *Oxendine* court did not even consider the admissibility of expert testimony under District of Columbia evidentiary rules.

be obliged to do so if the case were being tried in that court. "[W]hether a given question of fact is to be resolved by the judge or by the jury . . . is a procedural problem that is controlled by federal law." 5A *Moore's Federal Practice* ¶ 50.06 at 50-55 (2d ed. 1989).

The leading cases on this issue are *Herron v. Southern Pacific Co.*, 283 U.S. 91 (1931), and *Byrd v. Blue Ridge Rural Elec. Coop.*, 356 U.S. 525 (1958). In *Herron*, the defendant moved for a directed verdict on the ground of contributory negligence. The court directed a verdict for the defendant despite an express provision of the Arizona constitution that "[t]he defense of contributory negligence . . . shall, at all times, be left to the jury." 283 U.S. at 92. This Court affirmed the trial court's refusal to follow the state's constitutional rule and explained that "[t]he controlling principle . . . is that, state laws cannot alter the essential character or function of a Federal court. The function of the trial judge in a Federal court is not in any sense a local matter, and state statutes which would interfere with the appropriate performance of that function are not binding upon the Federal court under either the Conformity Act or the 'Rules of Decision' Act." 283 U.S. at 94.

State procedural and evidentiary rules do not apply in Federal courts and do not diminish the authority of Federal judges to grant directed verdicts or judgments n.o.v. Even if *Oxendine* could be read as holding that a District of Columbia court would be required to submit the causation issue to a jury under the facts presented in *Richardson*, that ruling would not bind a Federal court, just as the Arizona consti-

tutional provision did not bind the trial court in *Herron*.[9]

This Court has confirmed that the authority of *Herron* continues unaffected by *Erie*. In *Byrd*, this Court cited *Herron* with approval and expressly indicated that the intervening *Erie* decision did not affect its validity, noting, *inter alia*, that there is "a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." 356 U.S. at 538-39.

This matter is not, as Petitioners contend, controlled by *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940) (Pet., p. 9). That decision involved an application of the law of the case doctrine because the parties and the facts were identical and no Federal judge - jury relationship was involved. *Stoner* does not apply when the evidence submitted in two separate trials is different, when a Federal court is applying the Federal Rules of Evidence to the facts before it, or when a question of the judge-jury relationship in the Federal courts is presented.

B. There is no Conflict in the Circuits Concerning the Application of Rule 703 of the Federal Rules of Evidence

The Court of Appeals' decision in *Richardson* does not conflict with the decisions of any other Circuits concerning the application of the Federal Rules of

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[9] To the extent that any conflict exists between *Richardson* and *Oxendine* involving the sufficiency of evidence necessary to submit a case to a jury, it must be noted that the *Oxendine* decision rested in large part upon an incorrect construction by a local court of appeals of the United States Court of Appeals for the District of Columbia's decision in *Ferebee*. The *Richardson* court was certainly not required to accept another court's incorrect construction of its *Ferebee* decision.

Evidence. No other Court of Appeals has ever held, as Petitioners suggest, that a Federal trial court is not empowered under Rule 703 to review whether an expert's opinion has a sufficient basis.

Petitioners contend that the D.C. Circuit decision in *Richardson* is in conflict with decisions of the Fifth, Third and Sixth Circuits. This asserted conflict stems from a serious misreading of the decisions in these Circuits. To the contrary, each Court of Appeals in these Circuits has consistently held that a Federal trial court has the right and obligation to carefully review an expert's testimony to ensure that there exists a sufficient basis for any expert opinion.

The Fifth Circuit has never ruled that a Federal court is powerless to evaluate the basis for an expert's opinion, and none of the cases cited by Petitioners supports that proposition. In *Peteet v. Dow Chemical Co.*, 868 F.2d 1428 (5th Cir. 1989) (Pet., p. 10), the Fifth Circuit stated just the opposite:

> Despite this broad discretion, we are mindful that district judges and appellate courts must carefully review an expert's testimony to ensure that the expert has the necessary qualifications *and a sufficient basis for his opinion.*

868 F.2d at 1431. [citation omitted] (emphasis added.) In *Osburn v. Anchor Laboratories, Inc.*, 825 F.2d 908 (5th Cir. 1987), *cert. denied*, 108 S. Ct. 1476 (1988) (Pet., p.11), the Fifth Circuit reaffirmed its power to withdraw the case from the jury if the expert's opinion lacks a sufficient factual foundation. 825 F.2d at 916 n.13. ("If Dr. Benowitz's [plaintiff's expert] opin-

ion of causation were based solely on this theory, therefore, [defendant] might be correct that Dr. Benowitz's opinion could not provide the requisite support for the jury's verdict."). In both *Peteet* and *Osburn*, the Fifth Circuit reviewed the expert's opinion as well as the basis for the expert's opinion. The only difference between these cases and *Richardson* is that in these cases the Fifth Circuit ultimately concluded that a factual basis for the expert's testimony existed.[10]

Petitioners' contention that a conflict exists with the Fifth Circuit is even more frivolous in view of that Court's recent decision in *Brock v. Merrell Dow Pharmaceuticals Inc.*, 874 F.2d 307 (5th Cir.), *suggestion for reh'g en banc pending*, No. 88-2311 (filed June 20, 1989). This was another Bendectin case where the Court of Appeals evaluated plaintiffs' expert testimony. In *Brock*, the Fifth Circuit explicitly adopted the *Richardson* analysis, and concluded that the jury's verdict in favor of plaintiffs should be reversed. 874 F.2d at 311.

The Third Circuit likewise has not ruled that a Federal court is powerless to evaluate the basis of an expert's testimony. *E.g., Pennsylvania Dental Ass'n v. Medical Serv. Ass'n of Pennsylvania*, 745 F.2d 248, 262 (3d Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985).

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[10] Other Fifth Circuit cases have granted verdicts for the defense after conducting a Rule 703 analysis. In *Viterbo v. Dow Chemical Co.*, 826 F.2d 420, 422 (5th Cir. 1987), the Fifth Circuit specifically followed the decision of the D.C. Circuit in *Merit Motors, Inc. v. Chrysler Corp.*, 569 F.2d 666 (D.C. Cir. 1977), when it granted summary judgment for the defendant despite expert testimony that the defendant's product was the cause of plaintiff's illness. *See also Soden v. Freightliner Corp.*, 714 F.2d 498, 505 (5th Cir. 1983).

The decision in *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238 (3d Cir. 1983), *rev'd on other grounds sub nom. Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (Pet., p.11), is not to the contrary. In that case, the Third Circuit agreed that, if an expert's opinion is challenged under Rule 703, the Court must make an initial factual determination whether the requirements of Rule 703 have been satisfied. 723 F.2d at 276, 277. The only difference between *Japanese Electronic Products* and *Richardson* is that the Third Circuit ultimately concluded that there was a factual basis for the expert's opinion.

Nor has the Sixth Circuit ruled that a Federal court may not evaluate the basis for an expert's testimony. *E.g., Coal Resources, Inc. v. Gulf & Western Indus., Inc.*, 865 F.2d 761, 772 n.4 (6th Cir. 1989). Petitioners' reference to *In re Bendectin Litigation*, 857 F.2d 290 (6th Cir. 1988), *cert. denied*, 109 S. Ct. 788 (1989) (Pet., p. 12), for a claimed conflict with the Sixth Circuit is as misleading as it is inaccurate. In that case, the Sixth Circuit affirmed a jury verdict in favor of Merrell Dow in a consolidated trial involving over 1,000 plaintiffs. It had no occasion to construe or apply Rule 703 because it was not an issue on appeal. Petitioners' quotations are totally out of context. The Sixth Circuit did *not* reach, or even discuss, the question of whether the evidence presented created a jury issue.

In essence, Petitioners are asking this Court to make a third review of the lengthy trial record to see if it can find what two previous courts have not found—a factual basis for plaintiffs' expert testimony. This Court has ruled that such a factual canvassing

is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925). In the present case, Petitioners raise questions turning uniquely on the facts of this case. Certiorari, therefore, should be denied.

C. The Asserted Seventh Amendment Question is Frivolous

Petitioners' Seventh Amendment claim has even less merit. Essentially, Petitioners would have this Court consider whether the Federal Rules of Evidence and Federal Rules of Civil Procedure should be ignored whenever a party offers evidence it wishes a jury to assess. Whether proferred evidence is admissible or is sufficient even to raise a jury question is itself an issue of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). Here that legal issue was correctly determined by the lower courts in accordance with the governing Federal Rules. This does not raise a Seventh Amendment question meriting this Court's review.

III. CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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FILED
SEP 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARITA RICHARDSON, BY S. & E. RICHARDSON, GUARDIANS, et al.
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v.

RICHARDSON-MERRELL, INC.
Respondent.

REPLY BRIEF OF PETITIONERS

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Respondent.

REPLY BRIEF OF PETITIONERS

Respondent Richardson-Merrell Inc. has raised, in its Brief in Opposition and in its Supplemental Brief,[1] questions concerning the *Erie Railroad* effect of the decision of the District of Columbia Court of Appeals in *Oxendine I*, 506 A.2d 1100 (D.C. 1986), and of the role played in this case by Rule 703 of the Federal Rules of Evidence.

The Erie Railroad Argument

In both the Brief in Opposition (pp. 6–8) and the Supplemental Brief (unpaged first page), Respondent urges that the evidence was "different" in the two cases, so that *Oxendine I* is not controlling here. That is not what this Court can accept. Yes, the Court of Appeals *did* say, in its

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[1]The Supplemental Brief supplied to this Court the August 11, 1989, decision of the District of Columbia Court of Appeals in *Oxendine v. Merrell Dow Pharmaceuticals, Inc. (Oxendine II)*, which (for the second time) reinstated a jury verdict for the plaintiff in a Bendectin-injury case.

footnote 9, that our *Erie* argument "ignores the differences in the evidence presented in the two cases." But nowhere did the Court of Appeals purport to set out, or even hint at, what those "differences" were. Indeed, the Court of Appeals contradicted itself, because earlier in that same footnote 9, the Court referred to *Oxendine I* as "a Bendectin case in which substantially similar evidence was presented."

But the best refutation of the "differences in evidence" contention comes from the judge who tried the case. The District Judge pointedly said (as we stated in our Petition, pp. 4, 6) that the *Richardson* trial was "a virtual reprise of *Oxendine*" and that he had heard "*substantially the same evidence* as the trial judge in *Oxendine*." 649 F. Supp. 799.[2] (Emphasis added)

In its Brief in Opposition, p. 6, Respondent mentions two "large and powerful epidemiological studies" admitted into evidence in the *Richardson* trial, as if they were dispositive. What Respondent fails to tell the Court is that Petitioner presented evidence from an epidemiologist who testified that it could not be concluded, from either study, that Bendectin does *not* cause limb defects, and that in fact, the studies when analyzed could support the proposition that within reasonable scientific certainty, Bendectin *did* cause birth defects. This entire matter boils

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[2]Nowhere, either at 649 F. Supp. 799, 802 (which is pointed to by Respondent) or elsewhere, does the District Judge say that the *Richardson* evidence he is discussing (the world-wide literature on Bendectin) was not before the *Oxendine I* court. What he does say, at p. 799, is that the District of Columbia Court of Appeals in *Oxendine I* rendered "an opinion which, although accurately summarizing the testimony, did not address the significance of certain evidence bearing upon the current state of scientific knowledge." That statement, which may have misled Respondent (Brief in Opposition, p. 7), is a far cry from saying that this scientific evidence was not before the *Oxendine I* court.

down to simply one more "battle of the experts"—an issue for the jury to decide. *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529, 1535 (D.C. Cir. 1984), cert. den. 469 U.S. 1062 (1984).

The Brief in Opposition is misleading in saying, p.7, that 21 published, peer reviewed epidemiological studies were "admitted into evidence" in *Richardson*, but only three of these studies were "admitted" in *Oxendine I* and thus "never became part of the record." In fact, *almost all* of these 21 studies were before the jury in *Oxendine I*. They were read to the jury and discussed by experts on the witness stand, and summaries of them were even put on the blackboard for the jury to see. Thus the *Oxendine* jury was well acquainted with these studies.

The underlying basis of the *Erie Railroad* principle—that where state law issues are involved, state law *as pronounced by state courts* is to be applied by federal courts sitting in diversity—has been of course emphasized many times by this Court, and in almost the last pronouncement of the Court last term, that doctrine was repeated. In *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*, ____U.S.____ 109 S.Ct. 2909 (June 26, 1989), the Court rejected a suggestion that it should "craft some common-law standard of excessiveness that relies on notions of proportionality between punitive and compensatory damages," saying that "these are matters of state, and not federal, common law. Adopting a rule along the lines petitioners suggest would require us to ignore the distinction between the state law and the federal law issues. For obvious reasons, we decline the invitation." 109 S.Ct. 2922.

And in footnote 26, the *Browning-Ferris* opinion stated that because the federal courts operate under the strictures of the Seventh Amendment, "we are reluctant to stray too far from traditional common-law standards, or to

take steps which ultimately might interfere with the proper role of the jury." But that is precisely what has happened in this case. The courts below have adopted a course of action interfering with the role of the jury, despite "the strictures of the Seventh Amendment."

The Rule 703 Argument

Respondent in its Brief in Opposition, pp. 11–14, defends the use by the Court of Appeals of Rule 703 of the Federal Rules of Evidence to preclude the testimony of the experts offered by Petitioners. But the amazing fact is that although the Court of Appeals relied on Rule 703, see decision at A-13, 14, and stated in its famous footnote 9 that "the admissibility of testimony, which is governed by the Federal Rules of Evidence, is the crux of our decision in this case," the trial judge

(1) never mentioned Rule 703, and

(2) did not hold Petitioners' evidence inadmissible.

It was the Court of Appeals that introduced both of these concepts. How could the evidence for plaintiffs be "inadmissible," as the Court of Appeals claims, when (a) our eight experts were all held by the District Judge to be properly qualified, and (b) the judge specifically ruled that their evidence was admissible, despite objections by Respondent. All that really happened was that the courts below disagreed with the jury and substituted their opinions for those of the jury.

The District of Columbia, while it has not adopted the Federal Rules of Evidence, has adopted the standard of Rule 703 for admissibility of expert testimony. See *Lampkins v. United States,* 401 A.2d 966, 970 and n.9 (D.C. 1979); *L.C.D. v. District of Columbia,* 488 A.2d 918,

921 n.8 (D.C. 1985); *Garvey v. O'Donoghue*, 530 A.2d 1141, 1144 (D.C. 1987). Thus Rule 703 governed in the *Oxendine I* decision. Moreover, Respondent specifically conceded in oral argument in *Oxendine I* that the methodology of plaintiffs' experts was not in question.

Respectfully submitted,

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FILED
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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE BY ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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Pursuant to Rule 42 of the Rules of this Court, applicant respectfully moves this Court for leave to file the accompanying brief as amicus curiae in support of the Petition for Certiorari in this case. Respondent, through counsel, has denied consent to the filing of this brief.

Applicant, the Association of Trial Lawyers of America, is a voluntary bar association of approximately 60,000 attorneys who primarily represent the injured victims of tortious misconduct.

Litigation of claims by injured victims frequently demands testimony by qualified experts to assist the jury in making factual determinations. The decision below, in which the U.S. Court of Appeals for the District of Columbia announced a new rule limiting the admissibility of expert opinion, is therefore of grave concern to ATLA members.

Applicant believes that its brief in this case will be of assistance to this Court. The Federal Rules of Evidence were designed to provide uniformity in all federal courts with respect to the admission of evidence. The decision below, departing from both the language of Rule 703 and the manner in which federal courts have heretofore applied that Rule, introduces uncertainty concerning the standards for expert testimony in a wide variety of cases. The nationwide impact of this ruling may not be fully addressed in the briefs of the parties in this case.

For these reasons, applicant respectfully moves the Court for leave to file the accompanying brief as amicus curiae.

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On Petition For A Writ of Certiorari
To the United States Court of Appeals
For the District of Columbia

BRIEF AMICUS CURIAE OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE PETITION

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QUESTION PRESENTED

May a federal court exclude the testimony of an expert witness who is qualified and whose opinion is relevant and based on the type of facts or data reasonably relied upon by experts in the field, on the ground that the expert's conclusions are against the great weight of generally accepted scientific opinion in the field?

INTEREST OF AMICUS

The Association of Trial Lawyers of America ["ATLA"] is a voluntary association of approximately 60,000 attorneys who are primarily engaged in representing the injured victims of tortious misconduct. A plaintiff who alleges that he or she has been injured by wrongful conduct frequently must present expert testimony to assist the jury in making factual determinations, such as causation.

The Federal Rules of Evidence, promulgated by this Court and enacted by Congress, liberalized the rules governing the admissibility of expert testimony and provided uniformity in the application of those rules in federal courts. The decision by the District of Columbia Circuit, which imposes a new restriction on the admissibility of expert opinion and departs from the prevailing practice in other Circuits, is therefore a matter of serious concern to ATLA and its members.

In our complex society, we are exposed to dangers that often fall within the scope of expertise of a small number of specialists. Research in these fields is frequently dominated by large corporate enterprises who, in turn, may

be defendants in suits by injured victims. In essence, the court below takes from the jury the responsibility for assessing the credibility of expert opinion and places it in the hands of an undefined "consensus" of scientists, whose conventional wisdom may well be responsible for the hazard in the first place. In ATLA's view, this decision strikes at the heart of the role of the jury in actions by injured victims.

REASONS FOR GRANTING THE WRIT

I. THE COURT'S EXCLUSION OF EXPERT TESTIMONY OFFERED BY PLAINTIFF CONFLICTS WITH THE LANGUAGE AND INTENT OF FEDERAL RULES OF EVIDENCE 702 AND 703.

This Court promulgated, and Congress enacted, Federal Rules of Evidence 702[1] and 703[2] in an effort to liberalize the admissibility of expert testimony, ridding the law of discredited common-law restrictions. The rules require only that the expert possess sufficient specialized

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1 **RULE 702: Testimony by Experts**
If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training, or education, may testify thereto in the form of an opinion or otherwise

2 **RULE 703: Bases of Opinion Testimony by Experts**
The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

knowledge (qualifications), that the testimony be of assistance to the trier of fact (relevance), and that it be based on the type of facts or data reasonably relied on by experts in the particular field (adequate basis). The decision below fashions an additional requirement, that an expert's conclusions, to be credible as a matter of law, must not conflict with a wide consensus in the scientific field. This judicial barrier to expert testimony, Amicus submits, clearly violates both the plain language and the intent of Rules 702 and 703.

Carita Richardson was born with a severely deformed left arm and no right leg. During an eight-week trial, eight expert witnesses testified that Bendectin, which Carita's mother used during pregnancy to combat morning sickness, caused these birth defects. Defendant Richardson-Merrell, the maker of Bendectin, presented a battery of experts who told the jury that Bendectin is not associated with birth defects. The jury believed plaintiff's experts and returned a verdict for plaintiff, making a specific finding that Bendectin caused Carita's deformities. The fate of that verdict raises issues of great importance far beyond the Richardsons. In an era of increased sensitivity to the hazards of drugs, pollution, a wide variety of toxic substances, the ruling makes it more difficult for victims to present to the finder of fact voices which contradict conventional wisdom in the field.

The expert testimony supporting plaintiff's case clearly met the explicit requirements of Rules 702 and 703. Neither the district court nor the court of appeals doubted the qualifications of Dr. Done and the other experts to render opinions regarding the cause of Carita's deformities. Those opinions were clearly relevant, since causation was a central issue for the jury in the trial. Finally, it is clear that these experts based their opinions on facts or data of

a type reasonably relied on by experts in the field.

The court below notes that "Dr. Done predicated his opinion upon four factors: (1) chemical structure activity analysis, (2) *in vitro* (test tube) studies, (3) *in vivo* (animal teratology studies, and (4) epidemiological studies." 857 F.2d at 829. The court made much of Dr. Done's admissions that each of the first three factors, *standing alone,* is of limited value in determining causation.[3] The core of review, however, is the following unsupported assertion:

> Studies of this kind [chemical, *in vitro,* and *in vivo,* singly or in combination, are not capable of proving causation in human beings in the face of the overwhelming body of contradictory epidemiological evidence.

Id. at 830. Clearly the court's concern was not that experts do not rely on these types of studies, but rather that Dr. Done's inferences from these specific studies contradicted other scientists opinions. This became even more apparent in the court's complaint that Dr. Done's epidemiological opinion was based on his recalculation of the data in other published studies. There was no question that the underlying data was of a type reasonably relied upon by experts -- it was relied upon by defendant's witnesses. The

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[3] *Compare, Oxendine v. Merrell Dow Pharmaceuticals, Inc.,* 506 A.2d 1100, 1110 (D.C. 1986), a Bendectin suit in which plaintiff presented expert evidence similar to that in *Richardson.* The Court noted that Dr. Done relied on the combination of all four types of studies. "Like the pieces of a mosaic, the individual studies showed little or nothing when viewed separately from one another, but they combined to produce a whole that was greater than the sum of its parts: a foundation for Dr. Done's opinion that Bendectin caused appellant's birth defects."

court simply did not believe the conclusions Dr. Done drew from the data because they did not conform to the conclusions of other scientists, which were published in peer-reviewed journals. *Id.* at 831.

Although the court stated that its decision based on the inadequacy of the basis for Dr. Done's opinion under Rule 703, *id.* at 829, in reality, the court assessed the credibility of his conclusions, a function that is the province of the jury. Such a limitation is not within the plain language of Rule 703. Nor can such a restriction be grafted onto the Rule without doing violence to its intent.

The notion that the trial judge should determine whether a witness' opinion is a reasonable inference from the underlying facts was familiar to common law courts dealing with lay testimony. Dean Wigmore viewed it as a corollary to the knowledge requirement, though he stated that it should be used only rarely to exclude lay testimony. J. Wigmore, Evidence § 659(c) (3d ed. 1940). However, he condemned its use with respect to the testimony of experts in no uncertain terms:

> The inexpediency of applying the present principle (*ante,* § 659) in any but rare instances is the more apparent when a Court assumes to intrude into the technical domain of the engineer, the physician, and other scientific professional men, and to deny the possibilities of knowledge therein by refusing to listen to that which appears, to the lay understanding of the tribunal, as an incredible assertion or an unlikely inference. . . . The whole story is of the past, unpractical, and ill-founded, and is obnoxious to the modern principle of receiving whatever light can be thrown upon the issue by competent persons and then leaving their credit to

the jury.

Id. at § 662.

The purpose of Rules 702 and 703, as the Advisory Committee's Note to Rule 703 makes clear, was to broaden the admissibility of expert testimony. They do so by eliminating the judicial barriers to admitting expert testimony, entrusting to the jury, aided by vigorous cross-examination, to assess the weight of the witness. This spirit is succinctly expressed in the leading treatise on the rules: "We ought not assume the jurors are less intelligent or alert than lawyers or judges. And we ought not inhibit experts from giving us as much aid as they can." J. Weinstein & M. Berger, Weinstein's Evidence 703-29 (1988). The ruling of the court below stands in stark contradiction to the intent of the Rules.

It is also worth noting that the drafters incorporated the principle referred to by Dean Wigmore into Rule 701, governing opinion testimony by lay persons. "The rational connection test means only that the opinion or inference is one which a normal person would form on the basis of the observed facts." Weinstein & M. Berger, Weinstein's Evidence 701-18 (1988). That the drafters did not impose a similar requirement for expert testimony indicates that they intended no such barrier to expert testimony.

The district judge ruled that:

> Though Dr. Done might disagree, there is now nearly universal scientific consensus that Bendectin has not been shown to be a teratogen, and, the issue being a scientific one, reasonable jurors could not reject that consensus. . . " 649 F. Supp. at 803.

The court of appeals upheld this rationale, adding its own view that "the drug has been extensively studied and a wealth of published epidemiological data has been amassed, none of which has concluded that the drug is teratogenic." 857 F.2d at 832.

Amicus acknowledges that the proper use of expert testimony is a problem that has long concerned courts. Sophisticated scientific techniques and theories challenge the courts in providing for the fair and orderly administration of justice. If, however, we require a change in the rules affecting the admissibility of expert testimony, this should be accomplished through the established mechanism for amending the Federal Rules which draws upon the talents of the most respected scholars and jurists in the field. *See, e.g.,* Symposium, *Rules for the Admissibility of Scientific Evidence,* 115 F.R.D. 79 (1986)(a project sponsored by the A.B.A Section on Science and Technology assessing proposed modifications of Rule 702). It should not be left to individual courts to destroy the uniformity that the Rules sought to achieve and resurrect the type of haphazard development of the law of evidence that the rulemaking process was designed to replace.

This Court has recently undertaken review of several cases in order to provide authoritative and uniform application of the Federal Rules of Evidence. *E.G., Bourjaily v. United States,* 107 S.Ct. 2775 (1987)(Rule 801(d)(2)(E); *Huddleston v. United States,* 108 S. Ct. 1496 (1988)(Rule 404(b)); *Beech Aircraft Corp. v. Rainey,* 109 S.Ct. 439 (1988)(Rule 803(8)); *Green v. Bock Laundry Mach. Co.,* 109 S. Ct. 1981 (1989)(Rule 609).

Amicus submits that this case demonstrates an equally pressing need for an authoritative pronouncement

by this Court as to the proper application of Rules 702 and 703 in federal courts.

II. THE RULING OF THE COURT BELOW THAT AN EXPERT'S INFERENCES FROM FACTS OR DATA MUST CONFORM TO SCIENTIFIC CONSENSUS CONFLICTS WITH THE APPLICATION OF THE FEDERAL RULES OF EVIDENCE IN OTHER CIRCUITS AND WITH THE HIGHEST STATE COURT.

Rule 17(a) of the Rules of this Court states that a this Court will consider review of a case on writ of certiorari

> When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort;

Both of these factors are present in this case.

A. THE RULING OF THE FEDERAL COURT OF APPEALS, THAT THE INFERENCES BY AN EXPERT MUST CONFORM TO SCIENTIFIC CONSENSUS, IS IN CONFLICT WITH THE DECISIONS OF OTHER FEDERAL CIRCUITS.

The prevailing practice in federal courts dealing with expert testimony properly follows the command of Rule 703 to determine whether the underlying facts or data is of the type reasonably relied on by experts in the field. Where the basis so deficient experts would not rely upon it in their professional activities outside the courtroom, the trial judge may properly exclude the expert's opinion. *See,*

e.g., In re Agent Orange Product Liability Litigation, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd,* 818 F.2d 187 (2nd Cir. 1987). If the underlying data meets the standard, courts follow the settled precept,

> "Credibility determinations, weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict."

Anderson v. Liberty Lobby, Inc, 477 U.S. 242, 256 (1986).

By contrast, the rule devised by the court below focusses on the expert's inferences and conclusions, as distinct from their underlying basis. Where these conclusions conflict with a broad consensus among scientists, the court holds, no reasonable jury can believe them as a matter of law.

This decision below regarding the application of Rule 703 is in direct conflict with decisions in several other circuits. A clear example is *Osburn v. Achor Laboratories, Inc,* 825 F.2d 908, 915 (5th Cir. 1987):

> Rachelle merely argues that because the notion that chloramphenicol can cause leukemia without first causing aplastic anemia has not been widely accepted in the medical field, the opinions of the Osburns' experts that Mr. Osburn's leukemia was caused by exposure to chloramphenicol provide insufficient evidence of causation.
>
> This argument misses the point. An expert's opinion need not be generally accepted in the scientific community before it can be sufficiently reliable and probative to support a jury finding. . .

> What is necessary is that the expert arrived at his causation opinion by relying upon *methods* that other experts in his field would reasonably rely upon in forming their own, possibly different opinions, about what caused the patient's disease.

The Fifth Circuit recently reaffirmed its adherence to this principle in *Peteet v. Dow Chemical Co.,* 868 F.2d 1428, 1433 (5th Cir. 1989).

Similarly, the Third Circuit has noted that, under Rule 703, the trial judge must scrutinize the basis for a proffered expert opinion.

> But one the court finds that the data relied upon is such as experts in the field reasonably rely upon, the rigorous examination should be conducted in the cross-examination for which Rule 705 makes explicit provision. . . . [T]he suggestion that the court must, in deciding on admissibility, carefully scrutinize the underlying assumptions, the inferences drawn, and the conclusions reached, if followed rigorously, would result in the trial court, as distinguished from the fact-finder, deciding the weight to be given to the testimony.

In re Japanese Electronic Products Antitrust Litigation, 723 F.2d 238, 277 & 279 (3rd Cir. 1983), *rev'd on other grounds,* 475 U.S. 574 (1986).

In a large class action by Bendectin victims in the Sixth Circuit, the district judge conducted a trial solely on the causation issue, receiving testimony by some of the same experts for plaintiff who testified in *Richardson.* The court of appeals gave unqualified approval to the district judge's admission of the expert opinions and rigorous

cross-examination concerning the underlying studies, leaving it to the jury to determine credibility. Indeed, the court noted that "the jury verdict following trial here might have been for the plaintiffs instead of for the defendant." *In re Bendectin Litigation,* 857 F.2d 290, 325 (6th Cir. 1988).

Amicus submits that the decision below conflicts with those of other Circuits under Rule 703, warranting this Courts review.

B. THE RULING BY THE FEDERAL COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CONCERNING FEDERAL RULE OF EVIDENCE 703 IS IN CONFLICT WITH DECISIONS OF THE HIGHEST COURT OF THE DISTRICT OF COLUMBIA.

The District of Columbia Court of Appeals in a criminal case addressed the prosecution's argument that an expert's opinion was not admissible because the conclusions she drew from her studies were rejected by other scientists.

> If, as the government implies, the results of studies about battered women must be in accord with each other and have general acceptance in the scientific community before the experts who conducted the studies can testify about them in court, we would shift to the judge such responsibility for evaluating expert credibility. . . [S]atisfaction of the third *Dyas* criterion begins -- and ends -- with a determination of whether there is general acceptance of a particular scientific methodology, not an acceptance, beyond that, of particular study results based on that methodology.

Ibn-Tamas v. United States, 407 A.2d 626, 638-39, n.24 (D.C. 1979).

Consistent with that principle, in a case substantially identical to *Richardson* in its issues and evidence, the District of Columbia court reinstated a jury verdict in favor of a child born with limb defects. *Oxendine v. Merrell Dow Pharmaceuticals, Inc.,* 506 A.2d 1100 (D.C. 1986). The court found that the four types of studies relied upon by Dr. Done, when viewed together, were a proper basis for his opinion that Bendectin causes such defects, that his methodology was generally accepted in the field of teratology, and that his qualifications were unchallenged. That the expert testimony on both sides "revealed a disagreement as to how the epidemiological and other data should be interpreted" was a "battle in which the jury must decide the issue." *Id.*at 1110. The court concluded that the trial judge's judgment n.o.v. in favor of defendant was reversible error.

Amicus submits that the decision below presents a conflict both with other Circuits and with the highest court local court regarding Rule 703, warranting this Court's review.

III. THE RULING BY THE FEDERAL COURT OF APPEALS BELOW REPRESENTS AN UNWARRANTED INTERFERENCE WITH STATE SUBSTANTIVE LAW IN VIOLATION OF THE PRINCIPLES OF FEDERALISM.

Tort law is, fundamentally, state law, an expression of policy and basic notions of justice. This Court quite recently had occasion to remind us that in our system of federalism, federal courts necessarily play a limited role

with respect to tort law, applying the law of the state which provides the basis of decision. *Browning-Ferris Industries v. Kelco Disposal, Inc.*, No. 88-556 (June 26, 1989), slip. op. at 20. There the Court rejected the invitation to craft a common-law standard of excessiveness of punitive damage verdicts, stating that "these are matters of state, and not federal, common law. Adopting a rule along the lines petitioners suggest would require us to ignore the distinction between state law and federal law issues." *Id.* at 21.

That the court below characterizes its rule as "procedural," 857 F.2d at 825, n.9, does not alleviate these concerns. The line between substance and procedure shifts as the legal context changes. *Hanna v. Plumer*, 380 U.S. 460, 469 (1965). This is the case, as one court has recognized, with the rules governing expert opinion. *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230, 1233 (5th Cir. 1986)("To the extent that the decision to allow expert testimony as a source of evidence is significantly intertwined with the underlying substantive law, we will accord it less deference.")

Strict products liability, the substantive law of this case, is a compelling example of the necessity for federal courts to avoid creating a federal common law of torts that undermines state policy. Strict liability essentially lowered the burden of proof demanded of injured victims of defective products. A scholar who was instrumental in shaping this doctrine explains that strict liability was a considered attempt to advance specific notions of justice and social policy: To relieve injured victims of the unfair and often impossible burden of proving negligent conduct by a remote manufacturer, to further public safety through a stronger deterrent to the marketing of safe products, and to impose the cost of injury upon those who are best able

to spread the risk or insure against it. Wade, *On the Nature of Strict Tort Liability for Products,* 44 Miss. L.J. 825, 826 (1973).

Expert testimony is essential in nearly every products liability case. Plaintiffs bear not only the burden of proof, but also face the reality that many of the most qualified experts in a particular field are employed by or are otherwise dependent upon the manufacturers. One court, rejecting another judicial restriction on expert testimony, stated:

> If we were to declare as a rule of law that one must actually have practical experience in a given industry in order to qualify as an expert in litigation involving its products, we might very well place an onerous burden on plaintiffs in some cases. Where the industry is small and tightly knit, it may be difficult for the plaintiff to obtain the services of an expert currently employed therein, and it might be equally difficult to find someone who was formerly employed in the industry.

Knight v. Otis Elevator Co., 596 F.2d 84, 88 (3rd Cir. 1979).

Obviously a federal court rule that erects unduly high barriers against testimony by experts for plaintiffs involving scientifically difficult product liability cases risks undermining the very purpose for which the state adopted strict liability. Additionally, such a rule invites tort defendants to remove to federal court whenever possible, as did Richardson-Merrell in this case. Increasingly, federal courts will be placed in the anomalous position of developing state tort law in precisely those difficult cases, characterized by competing interests and policies, which should be the responsibility of state courts.

This intrusion into state tort law concerns is not necessitated by a federal legislative scheme, as in *Pilot Life Ins. Co. v. Dedeaux,* 107 S.Ct. 1549 (1987)(state tort action against insurer pre-empted by ERISA). Nor is it warranted by the federal interest represented by the Federal Rules of Evidence since, as argued above, the decision below is in conflict with the rules. Finally, the rule fashioned by the court below cannot be viewed as a response to those critics who view lay juries as incapable of resolving complex technical issues about which scientists themselves cannot agree. The court explicitly stated that "when the causation issue is novel and stands at the very frontier of current medical and epidemiological inquiry," the jury will continue to decide between the experts. 857 F.2d at 832. It is only the expert who challenges "near universal scientific consensus" who must not be heard by the jury. The irony is that the history of modern science, from Copernicus and Galileo to the present, has been an unbroken series of challenges to the conventional wisdom of the day.

In short, the rule below represents an unwarranted intrusion into the substantive law of the states, disturbing the delicate balance that is our system of federalism. This system is so fundamental to our system of justice that its violation is of constitutional magnitude, warranting corrective action by this Court.

CONCLUSION

For these reasons amicus urges this Court to grant the Petition for a Writ of Certiorari in this case.

Respectfully submitted,

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Aug. 4,1989

MOTION FILED
AUG 3 1989

No. 89-12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

CARITA RICHARDSON, BY
S. & E. RICHARDSON, GUARDIANS, et al.,
Petitioners,

v.

RICHARDSON-MERRELL, INC.,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

AMICUS CURIAE BRIEF OF THE ASSOCIATION OF BIRTH DEFECT CHILDREN

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MOTION OF ASSOCIATION OF BIRTH DEFECT CHILDREN TO FILE AMICUS CURIAE

1. Petitioner is the Association of Birth Defect Children, a non-profit organization representing children with severe birth defects.

2. Petitioner moves this Court to allow the filing of the attached Amicus Curiae Brief.

3. The Brief sets forth facts and legal argument relevant to the disposition of this case, and bears directly upon the issue of Federal Rule of Evidence 703 relating to "Basis of Opinion Testimony by Experts."

4. The Amicus Brief addresses state court cases such as Blum vs. Merrell Dow Pharmaceuticals, Inc., No. 01867 and No. 02016 Phila. 1988 (Pa.Super. June 14, 1989) and Oxendine v. Richardson-Merrell, 506 A.2d 1100 (D.C. 1986), in which the courts did not grant judgment n.o.v.. on the basis that there was insufficient sufficient evidence to create a jury issue based upon expert testimony.

5. In the interests of justice, the Amicus Curiae Brief of the Association of Birth Defect Children, representing children with birth defects similar to those of Carita Richardson, should be considered by this Court, in its decision on the granting of Carita Richardson's Petition for a Writ of Certiorari.

6. Amicus Association of Bendectin Children requested consent to file this brief which was refused by Respondent, Richardson-Merrell, Inc.

Respectfully Submitted,

Thomas R. Kline, Esquire

Date: August 3, 1989

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INTEREST OF THE AMICUS

The Association of Birth Defect Children is a non-profit organization formed in 1982 to serve as an international emotional and informational support system for families of children with birth defects. The Association provides newsletters and information to families as well as medical, educational and social service personnel.

By way of this amicus curiae brief, the Association seeks to protect the interest of all children who suffered or will suffer from exposure to any dangerous chemicals or

drugs. The decision of the District of Columbia Circuit Court, if allowed to stand, would seriously curtail the admissible evidence in many suits. Many similarly situated children, not only those suffering from their mother's use of Bendectin, will be denied their right to a jury trial pursuant to the Seventh Amendment to the Constitution of the United States.

SUMMARY OF THE ARGUMENT

The Circuit Court below improperly applied Federal Rule of Evidence 703, thereby overturning a valid jury verdict based upon valid expert testimony. Medical testimony, in other Bendectin trials in the state and federal courts in the United States, was deemed sufficient to create a jury issue. The District of Columbia Court of Appeals in this case, in reaching a contrary result erred first in its refusal to consider the testimony in its entirety, and second in its incorrect application of Rule 703. The Court below acted as both scientist and jurist, incorrectly taking away the traditional jury

function, as a matter of law, and depriving plaintiff, a severely damaged child, to her right to a trial by jury under the Constitution of the United States.

In two state court opinions, Oxendine v. Merrell Dow Pharamaceuticals, Inc., 506 A.2d 1100 (D.C. 1986) and Blum v. Merrell Dow Pharmaceuticals, No. 1027 C.C.P. Phila., May 12, 1988, rev'd on other grounds, Nos. 01867 and 02016 Philadelphia 1988 (Pa.Super. June 14, 1989), petition for allocatur and cross-petition for allocatur filed, the respective appeals courts refused to grant judgment n.o.v. against a verdict rendered by a jury upon scientific and

medical evidence regarding the drug Bendectin. So too, in two cases in the United States District Court for the Eastern District of Pennsylvania, the evidence was sufficient to create a jury issue. And, in the federal multidistrict Bendectin trial, the Sixth Circuit Court of Appeals held that the scientific evidence could have supported a plaintiff's verdict.

The District of Columbia Circuit Court below erred in its stripping of the jury from its proper function and in using Rule 703 to justify the result.

ARGUMENT

The Decision of the Court Below Based Upon Federal Rule of Evidence 703 Was Illogical And Irrational In Concluding That The Expert Testimony In This Bendectin Case Was Insufficient To Present A Jury Issue.

In contrast to the decision of the court below based upon Federal Rule of Evidence 703, the appellate courts of two non-federal jurisdictions have thoroughly reviewed the evidence presented in two lengthy Bendectin trials, and have apparently reached the conclusion that the evidence formed an adequate basis for a verdict in favor of the plaintiff. The first case, Oxendine v. Merrell Dow Pharamaceuticals, Inc., 506 A.2d 1100

(D.C. 1986), was decided in the local courts of the District of Columbia in 1986. Subsequently, in 1988, the Superior Court of Pennsylvania rendered the decision of Blum v. Merrell Dow Pharmaceuticals, Inc., Nos. 01867 and 02016 Philadelphia 1988 (Pa. Super. June 14, 1989), petition for allocatur and cross petition for allocatur filed. In reviewing these decisions it is clear that expert testimony in a medical and scientific case involving a prescription drug product qualifies as sufficient evidence creating a factual issue for jury determination either

under state or federal rules of evidence.

In Oxendine, the plaintiff, who suffered severe limb deformities, brought an action against Merrell Dow alleging that her mother's use of the drug Bendectin was the cause of her deformities. The trial, which included the testimony of eighteen witnesses, lasted approximately three weeks and ultimately resulted in a jury award of $750,000.00 in compensatory damages. Merrell Dow, thereafter, filed a motion for judgment n.o.v. or, in the alternative, for a new trial. The trial court in granting the motion stated that "[i]t is clear to the Court from review of the evidence adduced at

the trial of this action that no conclusion one way or another can be drawn from any of the... relied upon bases, respecting whether Bendectin is a human teratogen." Oxendine, 506 A.2d at 1103.

On appeal, the trial court's granting of judgment n.o.v. was reversed. The District of Columbia Court of Appeals reviewed the testimony submitted by the experts, which consisted of various studies analyzing the teratogenic effects of Bendectin. The first of the studies in that case was the chemical structure activity analysis. This enables a pharmacologist to look at the structure of a compound to predict the

outcome of the drug's activity. The second test relied upon was the in-vivo (animal) studies. This produces evidence establishing Bendectin's teratogenic effects on other species. The third test relied upon, the in-vitro (test tube) studies, is particularly valuable for focusing on the specific effect of a drug. The scientist has the ability to separate limb bud cells of animal embryos for the purpose of determining whether the development of the limbs is thwarted by the exposure to a particular drug. Fourth, there are epidemiological studies, which are "the study of the frequency of disease in human populations and the way in which that

frequency varies from one population to another." Oxendine, 506 A.2d at 1107.

Alan Done, M.D., a pediatrician and toxicologist testified as an expert witness in Oxendine that none of the four types of evidence could in and of itself establish that Bendectin had teratogenic effects in humans. However, each separate test result is indicative of the harmful effects of Bendectin on fetuses. For example, the chemical structure activity analysis establishes that doxylamine succinate, which is a component of Bendectin, is a known teratogen in some animals and a suspected teratogen in humans. The in-vitro test, conducted on female rabbits, resulted in mild limb

alterations when minimal doses were administered during pregnancy. Other studies performed on mice, rats, and monkeys further supported Dr. Done's position that Bendectin is a teratogen. The in-vitro tests, performed by a Dr. Hassell, provided data that supported the conclusion that Bendectin interfered with the growth and development of limb bud cells. Finally, the epidemiological studies, would support Dr. Done's conclusion that Bendectin caused severe birth defects. Oxendine, supra.

The trial court, in Oxendine, like the District of Columbia Circuit Court in this case, disregarded the totality of plaintiff's expert

testimony. Rather, the court focused on "[Dr. Done's] inability to conclude that Bendectin was a teratogen on the basis of any of the individual studies which he discussed". Oxendine, 506 A.2d at 1108. In granting the judgment n.o.v.

> [t]he court focused on this fact and concluded that if each type of data, viewed in isolation, was not sufficient to prove that Bendectin caused birth defects, then all of them taken together could not prove it either. Id. at 1104.

The District of Columbia Court of Appeals overruled the decision of the trial court, stating:

> [T]he court erred...in failing to consider the same expert's testimony that all of the studies, taken in combination, did support such a finding as [Dr. Done]

> carefully and repeatedly explained...In ruling on motion for judgment n.o.v., the court must view the evidence as a whole, not in fragments. Like the pieces of a mosaic, the individual studies showed little or nothing when viewed separately from one another, but they combined to produce a whole that was greater than the sum of its parts...Because he fully explained to the jury that his opinion was based on all of the studies, we cannot say that no reasonable juror could reach a verdict in favor of appellant. Id. at 1110. (emphasis in the original).

Therefore, the District of Columbia Court of Appeals reversed the decision of the lower court, and properly reinstated the jury verdict for the plaintiff.

In a Pennsylvania Bendectin case, Blum, supra, both the state trial court

and state appellate court faced the issue of whether the evidence submitted by the plaintiff was sufficient to withstand defendant's post-trial motion for judgment n.o.v. Both courts declined to grant judgment n.o.v. requested by the defendant drug manufacturer. In that case, plaintiff's expert "testified to relying upon the structure/activity of the drug, as well as in vitro, animal and epidemiological studies in reaching his conclusion that Bendectin is a teratogen (causes or increases the risk of birth anomalies) in humans". Blum, No. 01867 and 02016 Philadelphia 1988, Slip Op. at 3. The trial court held that "[v]iewing the aforementioned

evidence...clearly negates any argument that a judgment n.o.v. is warranted." Blum v. Merrell Dow Pharmaceuticals, No. 1027 Slip Op. at 14 (C.C.P. Phila. May 12, 1988), rev'd on other grounds, Nos. 01867 and 02016 Philadelphia 1988 (Pa.Super. June 14, 1989), petition for allocatur and cross petition for allocatur filed. Thus, the Pennsylvania courts dismissed the defendant's claim based upon the sufficiency of plaintiff's evidence.

The District of Columbia Circuit Court in Richardson, in granting a judgment n.o.v., did not address the Blum decision. The Circuit Court did address Oxendine, attempting to distinguish it by the circuitous

application of the Federal Rule of Evidence Rule 703, which provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the factors or data need not be admissible in evidence.

In construing this Rule, the Court below emphasized that "the grounds relied on by an expert must be 'a type reasonably relied upon by experts in a particular field.'" Richardson v. Richardson-Merrell, Inc. 857 F.2d 823, 829 (D.C. Cir. 1988), quoting, Fed.R.Evid. 703. The court then centered its entire analysis around its

own perception of the credibility of evidence. At the start, the court recognized that the possible teratogenic effects of Bendectin are "scientific in nature, and it is to the scientific community that the law must look for the answer." Id. at 829. However, the court then provided its own scientific answer setting itself up as jurist and scientist as well. It criticized the Oxendine court because the latter "did not address the significance of certain evidence bearing upon the current state of scientific knowledge [and had] judicially reopened an esoteric 20-year-old controversy which is by now essentially settled within the

scientific community." Richardson, 857 F.2d at 825 n.9. This demonstrates that the Richardson court arbitrarily concluded that a minority view is of no merit. However, the Fifth Circuit, in Osborn v. Anchor Laboratories, 825 F.2d 908, 915 (5th Cir. 1987), cert. denied, 108 S.Ct. 1476)(1988), provided that:

> An expert's opinion need not be generally accepted in the scientific community before it can be sufficiently reliable and probative to support a jury finding...What is necessary is that the expert arrived at this causation opinion by relying upon methods that other experts in his field would reasonably rely on in forming their own, possibly different opinions, about what caused the patient's disease. (Emphasis in the original)

In Oxendine, several of the defense experts conceded that plaintiff's expert's methodology was proper even though they chose alternative methods. But the Circuit Court in Richardson stated that "whether an expert's opinion has an adequate basis, and whether without it an evidentiary burden has been met are matters of law for the court to decide." In Richardson, 857 F.2d at 829, even though the District of Columbia Court of Appeals tactily recognized that the scientific evidence is the legitimate subject of debate before a jury, the court then flatly stated that "[w]e conclude that Dr. Done's opinion lacks an adequate basis". Id. at 829. The

court, therefore, illogically and incorrectly stripped the jury of its function in the face of a sufficient legal record upon which the jury rendered its decision.

By invalidating the sufficiency of the testimony, the court contradicted the fundamental doctrine that establishes that:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion from summary judgment or for a directed verdict. Anderson v. Liberty Lobby, 477 U.S. 242, 255 (1986).

The ruling in Anderson is premised upon the notion that:

> Judges, both trial and appellate, have no special competence to resolve the complex and refractory causal issues raised by the attempt to link low level exposure to toxic chemicals with human disease. On questions such as these, which stand at the frontier of current medical and epidemiological inquiry, if experts are willing to testify that such a link exists, it is for the jury to decide whether to credit such testimony. Oxendine, 506 A.2d at 1104, quoting, Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1534 (D.C. Cir.), cert.denied, 469 U.S. 1062 (1984).

However, under the contradictory reasoning set forth by the District of Columbia Circuit Court in this case, the judge had the final say as to what the "scientific community" would have determined, clearly usurping the jury's function as a fact finder.

With respect to the scientific evidence in Bendectin cases, it has been stated in a federal Bendectin case by Senior Judge Charles Weiner of the Eastern District of Pennsylvania that where the "plaintiff's experts say 'it tis' and the defendant's experts say 'tis not'," Rosen, et al. v. Richardson-Merrell, Inc., No. 82-0513, Slip Op. at 12 (E.D. Pa. July 22, 1987), then a classic jury issue has been created. Judge Weiner made this statement in an Opinion rendered after hearing two Bendectin jury trials to verdict. See, Rosen, supra; Lanzilotti v. Merrell-Dow Pharmaceuticals, Inc., No. 82-0193 (E.D. Pa. 1986). Similarly, in In re Richardson-Merrell,

Inc. Bendectin Product Liability Litigation, MDL No. 486, 857 F.2d 290 (6th Cir. 1988), cert. denied (1989), in an Opinion dated August 30, 1989 affirming a defense verdict in the federal multi-district litigation Bendectin trial, the Sixth Circuit Court of Appeals clearly acknowledged that the issue of whether Bendectin causes birth defects is clearly a jury question. The Court stated that "it is helpful to perspective to realize, as we observed earlier, that the jury verdict following trial here might have been for plaintiffs instead of defendant." Id. at 325. This case truly is "a classic battle of the experts, a battle in which the jury

must decide the victor." Oxendine, 506 A.2d at 1110, quoting, Ferebee, 736 F.2d at 1535; see also, Richardson, 857 F.2d at 826. Because of the District of Columbia Court of Appeals' myopic view of what is or is not admissible under Rule 703, the Court failed to recognize that this case presented the "classic battle," and jury verdict must stand.

In conclusion, in both Oxendine and Blum scientific and medical evidence was deemed sufficient by two state appellate courts to create a jury issue in Bendectin cases. So too, in Rosen, supra, and Lanzilotti, supra, a jury issue was created. By the admission of the defense's experts in

Oxendine, plaintiff's expert opinions were founded upon acceptable scientific methods. The Circuit Court in this case improperly applied Rule 703 to reach its desired result, without regard for the jury's traditional function. Furthermore, the District of Columbia Circuit Court improperly viewed the testimony in fragments, as opposed to recognizing its collective effect. The court in Oxendine and Blum, as well as Rosen and Lanzilotti, clearly found that medical and scientific evidence is sufficient to sustain a jury verdict. Richardson should be treated no differently, and Rule 703 does not dictate a contrary result.

CONCLUSION

Based upon the foregoing, amicus curiae respectfully requests that this Court grant Petitioner's Petition for Certiori.

Respectfully submitted,

ASSOCIATION OF BIRTH DEFECT CHILDREN

BEASLEY, CASEY, COLLERAN, ERBSTEIN, THISTLE, KLINE and MURPHY

BY: Thomas R. Kline
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CERTIFICATE OF SERVICE

I, THOMAS R. KLINE, ESQUIRE, hereby certify that on August 3, 1989, counsel listed below were served by with three true and correct copies of Motion for Leave to File Brief as Amicus Curiae and Amicus Curiae Brief of the Association of Birth Defect Children:

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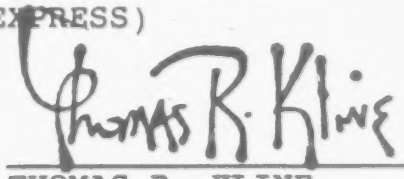

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(4)

No. 89-12

Supreme Court, U.S.
FILED
AUG 11 1989
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARITA RICHARDSON, *et al.*,

Petitioners,

v.

RICHARDSON-MERRELL INC.,

Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT IN RESPONSE TO THE BRIEF AMICUS CURIAE FILED BY THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This supplemental brief is respectfully submitted by Respondent Merrell Dow Pharmaceuticals Inc. to respond briefly to two new arguments contained in the brief *amicus curiae* filed on August 4, 1989 by the Association of Trial Lawyers of America ("ATLA").[1]

A. The *Richardson* Court did not Hold That Under Rule 703 an Expert's Opinion Must not Conflict With the Scientific Consensus

ATLA claims that the *Richardson* decision conflicts with Rules 702 and 703 of the Federal Rules of Evidence. This argument is based solely upon ATLA's contention that the Court of Appeals construed these Rules to require "that an expert's conclusions, to be credible as a matter of law, must not conflict with a wide consensus in the scientific field." (ATLA Br., p. 3). Nothing in the *Richardson* opinion interprets Rules 702 or 703 as imposing this requirement—ATLA has simply manufactured a holding that does not exist.

The *Richardson* Court based its decision upon this Court's ruling in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-250 (1986), which held that no issue for trial is presented unless there is sufficient evidence to support a jury verdict. Accordingly, the Court of Appeals examined whether "there was *sufficient evidence* upon which a jury could properly base a verdict for the Richardsons." 857 F.2d at 828 (A-12) (emphasis in original). The *Richardson* Court reviewed all the scientific evidence presented by the plaintiffs, including the evidence presented by plaintiffs in the

[1] The ATLA brief was filed along with a Motion for Leave to File Brief Amicus Curiae. Respondent received a copy of these papers with the attached brief on the same day that it filed its Opposition to Petition for Writ of Certiorari.

form of an expert's opinion. The Court of Appeals found that under Rule 50(b) of the Federal Rules of Civil Procedure plaintiffs' evidence as a whole was insufficient to allow the jury verdict to stand.

In reaching this conclusion, the Court of Appeals carefully reviewed the scientific foundation for Dr. Done's opinion to determine whether, in the language of Rule 703, it was based on grounds "of a type reasonably relied upon by experts in the particular field." 857 F.2d at 829 (A-14). Dr. Done's opinion evidence concerning Bendectin was rejected because it did not have an adequate basis, not because it conflicted with the consensus in the scientific community:

> We conclude that Dr. Done's opinion lacks an adequate basis and therefore, whether viewed alone or in conjunction with those of the other experts, did not provide the "substantial probative evidence" that would require us to leave the verdict as the jury rendered it.

857 F.2d at 829 (A-13).[2]

Contrary to ATLA's contention, Rule 703 does not require a Federal court automatically to accept expert opinion evidence when given by a qualified expert in a relevant area (ATLA Br., p. 6). This construction

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[2] ATLA agrees that a court may exclude expert testimony which has no basis: "Where the basis [is] so deficient experts would not rely upon it in their professional activities outside the courtroom, the trial judge may properly exclude the expert's opinion. *See e.g., In re Agent Orange Product Liability Litigation*, 611 F. Supp. 1223 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2nd Cir. 1987)." (ATLA Br., pp. 8-9).

would eliminate Rule 703's requirement that to be admissible, the opinion must be based on grounds "of a type reasonably relied upon by experts." The *Richardson* Court never stated that if an expert's opinion had an adequate basis it could be rejected solely because it was not in accord with the scientific consensus. Rather, the Court stated that based on its analysis of the facts *in this case* the opinion evidence presented by Dr. Done did not have an adequate basis and, therefore, the grounds relied upon by Dr. Done for his opinion were not "of a type reasonably relied upon by experts in the field."

B. The *Richardson* Decision did not Restrict the Substantive State Law of Torts

There is no basis for ATLA's argument that the *Richardson* Court has impermissibly restricted the substantive state law of torts (ATLA Br., pp. 12-15). This argument is merely a restatement of the *Erie* argument already raised by Petitioners. The Court of Appeals in *Richardson* properly applied the Federal Rules of Civil Procedure and the Federal Rules of Evidence to the facts presented by the parties as required by *Hanna v. Plumer*, 380 U.S. 460 (1965). The application of these Rules is a procedural matter and *Erie* does not apply. (*See* Respondent's Opposition, pp. 8-11). ATLA's citation of *In re Air Crash Disaster at New Orleans, La.*, 795 F.2d 1230 (5th Cir. 1986) (Higginbotham, J.), does not support a contrary position. In that case the Fifth Circuit specifically held that expert testimony was inadmissible because it lacked an adequate basis and was speculative:

> In sum, we adhere to the deferential standard for review of decisions regarding the ad-

> mission of testimony by experts. Nevertheless, we take this occasion to caution that the standard leaves appellate judges with a considerable task. We will turn to that task with a sharp eye, particularly in those instances, hopefully few, where the record makes it evident that the decision to receive expert testimony was simply tossed off to the jury under a "let it all in" philosophy. Our message to our able trial colleagues: it is time to take hold of expert testimony in Federal trials.

795 F.2d at 1234.

CONCLUSION

For all of the aforementioned reasons, the petition for writ of certiorari should be denied.

Dated: August 11, 1989

Respectfully submitted,

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(5)

Supreme Court, U.S.
FILED
AUG 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARITA RICHARDSON, *et al.*,

Petitioners,

v.

RICHARDSON-MERRELL INC.,

Respondent.

SUPPLEMENTAL BRIEF FOR RESPONDENT REGARDING AUGUST 11, 1989 DECISION OF THE DISTRICT OF COLUMBIA COURT OF APPEALS IN *OXENDINE V. MERRELL DOW PHARMACEUTICALS INC.*

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This supplemental brief is respectfully submitted by Respondent, Merrell Dow Pharmaceuticals Inc., to bring to the Court's attention the recent decision of the District of Columbia Court of Appeals in *Oxendine v. Merrell Dow Pharmaceuticals Inc.*, App. No. 88-335 (D.C. August 11, 1989)("*Oxendine II*"), a copy of which is attached.

In Respondent's brief in opposition to the petition for writ of certiorari, it was stated, at p. 9, that an appeal to the D.C. Court of Appeals in *Oxendine v. Merrell Dow Pharmaceuticals Inc.*, Civ. No. 1245-82 (Super. Ct. D.C. Feb. 12, 1988) (Memorandum and Order) was pending. On August 11, 1989, the D.C. Court of Appeals decided the appeal in *Oxendine II* and reversed Judge Wolf's order granting a new trial based upon the perjury of Petitioners' principal expert witness. In their decision, the D.C. Court of Appeals stated:

> However, as noted by the District Court judge in the United States Court of Appeals for the District of Columbia Circuit, there was different evidence presented in *Richardson*. 649 F. Supp. at 802; 857 F.2d at 825 n.9. The record in *Richardson* is not before us, nor was it before Judge Wolfe. Hence, it cannot influence our decision.

Oxendine II, slip op. at 17.

Respectfully submitted,

Dated: August 15, 1989

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APPENDIX

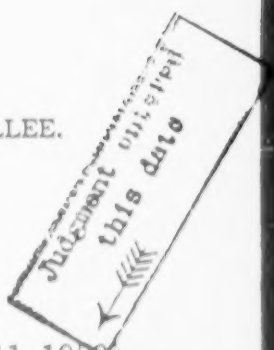
DISTRICT OF COLUMBIA COURT OF APPEALS

No. 88-335

MARY VIRGINIA OXENDINE, APPELLANT,

v.

MERRELL DOW PHARMACEUTICALS, INC., APPELLEE.



Appeal from the Superior Court of the
District of Columbia, Civil Division
(Hon. Peter H. Wolf, Motions Judge)

(Argued February 7, 1989 Decided August 11, 1989)

Barry J. Nace, with whom *Irving R. M. Panzer* was on the brief, for appellant.

Walter A. Smith, Jr., with whom *Vincent H. Cohen*, *Alphonso A. Christian II*, and *William D. Nussbaum* were on the brief, for appellee.

Before ROGERS, *Chief Judge*, and FERREN and BELSON, *Associate Judges*.

ROGERS, *Chief Judge*: Appellant Mary Oxendine appeals the grant of a motion under Super. Ct. Civ. R. 60 (b)(6) vacating a 1983 judgment in her favor and granting a new trial.[1] The motions judge found that appellee Merrell Dow Pharmaceuticals, Inc., was entitled to relief although the trial had commenced five years

[1] This is an interlocutory appeal. D.C. Code § 11-721 (d) (1981).

earlier and this court had confirmed appellant's entitlement to judgment three years ago in *Oxendine v. Merrell Dow Pharmaceuticals, Inc.*, 506 A.2d 1100 (D.C. 1986) (*Oxendine I*). As his ground for vacating the judgment, the motions judge found that appellant's sole causation witness "grossly misrepresented" his credentials to such an extent that all his testimony on appellant's behalf became suspect. Appellant contends that the motions judge abused his discretion first, because the motion was not filed "within a reasonable time," as mandated by the rule, since appellee had knowledge of the alleged misrepresentations at least three years earlier, and second, because the alleged misrepresentations, which were not about the substantive issues in the case, dealt only peripherally with the expert's credentials and, thus, did not meet the standard of materiality required for vacating a judgment and granting a new trial. Appellant also contends that the findings of deliberate and intentional misrepresentations are unsupported by the record.

We hold that the motions judge did not abuse his discretion in finding that the motion to vacate was timely filed, but that he did err in vacating the judgment and granting a new trial.

I

Eight years ago appellant Mary Oxendine filed suit against appellee claiming that her mother's use of Benedectin, a drug manufactured and produced by appellee for use by pregnant women, had caused appellant's birth defects and deformities. Appellant's sole causation witness at the jury trial, Dr. Alan K. Done, was qualified as an expert witness without objection by appellee.[2] Dr. Done testified that Benedectin caused ap-

[2] Dr. Done's Curriculum Vitae, which runs over twenty pages, shows that he has held numerous medical appoint-

pellant's birth defects, basing his conclusion upon four types of scientific data which, he opined, taken together supported his conclusion. On May 27, 1983, the jury returned a verdict in favor of appellant, but on September 1, 1983, the trial judge, the Honorable Joseph M. Hannon, granted appellee's motion for judgment notwithstanding the verdict. Appellant appealed and this court reversed, ordering that the jury verdict in favor of appellant be reinstated. *Oxendine I*, 506 A.2d at 1114-15. On July 15, 1986, more than three years after the original trial, appellee filed a motion under Rule 60 (b)(6) claiming that Dr. Done had testified falsely at trial. Following an evidentiary hearing, Judge Peter H. Wolf [3] granted the motion on February 11, 1988.

Judge Wolf found that Dr. Done knowingly and intentionally gave false testimony at trial in six areas, all of which, the judge conceded, related to Dr. Done's qualifications and not to any substantive issues in the case. Specifically, Judge Wolf found that Dr. Done testified at trial that:

> (1) he was presently, on May 3 and May 11, 1983, a member of the Wayne State University

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ments and professorships, served on the editorial boards of a number of medical publications, and authored or co-authored at least 148 technical papers. He held the position of Special Assistant to the Director for Pediatric Pharmacology, Bureau of Drugs, U.S. Food and Drug Administration, for four years, participated as a speaker at numerous symposia and meetings, and has received many honors, fellowships and certifications in toxicology and pediatrics, including membership in a long list of prestigious medical societies and biographical directories.

[3] Judge Hannon recused himself from further proceedings and the case was assigned to Judge Wolf.

Medical School faculty, when, in fact, he had submitted a letter of resignation from Wayne State dated April 24, 1983, to the Dean of the University, which the Dean accepted on April 29, 1983;

(2) he was, at the time of the trial, Chairman of the Formulary Committee at Children's Hospital, a hospital affiliated with the Wayne State Medical School, when, in fact, he had ceased in January 1982 to be Chairman and in March 1982 to be a member of the Committee;

(3) he was presently responsible for a fully-staffed laboratory at Children's Hospital which conducted ongoing research at his request and direction, even though Dr. Done had no laboratory assigned solely to him for the two years prior to his testimony and had conducted no research projects at any laboratory during that time;

(4) he was presently responsible for the care and treatment of patients, even though after his resignation he had no such responsibilities; and

(5) he was a Professor of Pharmacology and Toxicology at the Wayne State Medical School, when no such faculty rank existed and his correct title was Professor of Pediatrics and Pharmacology.

Judge Wolf also found that Dr. Done implied at trial that he was an expert in teratology (the study of birth defects and malformations) and epidemiology (the study of disease incidence and control in a population), but

later stated at the evidentiary hearing that he was not an expert in those entire fields.[4]

Regarding the knowledge of counsel for the parties, Judge Wolf found that neither counsel for appellant nor counsel for appellee had actual knowledge, or should have known, about Dr. Done's departure from the Wayne State Medical School prior to or during the trial, and that appellee's counsel did not have a duty to inquire about the circumstances of Dr. Done's departure when they first learned on May 27, 1983, the day of the jury verdict, that he was no longer affiliated with the University. Appellee's counsel did not inquire further about Dr. Done's status until after this court in *Oxendine I* reinstated the jury verdict in March 1986. Appellant's counsel first learned in August 1983 about Dr. Done's resignation in connection with their preparation for Dr. Done's deposition in another case in which he was testifying as an expert.

II

Timeliness of Rule 60 (b)(6) Motion. Appellant contends that Judge Wolf abused his discretion in granting

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[4] Judge Wolf cited three other alleged misstatements made by Dr. Done at the Rule 60 (b) (6) evidentiary hearing which are not relevant to the issue in the instant appeal regarding the effect of Dr. Done's trial testimony, but bear on Judge Wolf's estimation of Dr. Done's credibility generally.

[5] Super. Ct. Civ. R. 60 (b) (6) provides:

> (b) *Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc.* On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> * * *
>
> (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time . . . .

a Rule 60 (b)(6)[5] motion so long after appellee first learned of Dr. Done's resignation. Appellee responds that it moved for relief very promptly after it had an outstanding adverse judgment from which to seek relief. Judge Wolf agreed with appellee that there was no adverse judgment from which it could seek relief until *Oxendine I* reinstated the jury verdict in March 1986, and found that appellee filed its motion within a reasonable time thereafter in June 1986. We agree.

A motion under subsection (6) of Rule 60 (b) must be made within a reasonable time, and what is reasonable depends upon the facts in each individual case. *Profitt v. Smith*, 513 A.2d 216, 218 (D.C. 1986). We will not reverse the trial court's decision that the motion was made within a reasonable time absent a clear abuse of discretion. *Id.*; *Tribble v. American Mut. Ins. Co.*, 277 A.2d 659, 661 (D.C. 1971).

There is nothing in the record to suggest that appellee was aware of either the pre-trial change in Dr. Done's faculty status before the jury returned a verdict in appellant's favor, or of the reasons for Dr. Done's resignation before the trial judge granted appellee judgment notwithstanding the verdict. Hence, appellee could not have rectified the matter during the trial or grounded its motion for judgment notwithstanding the verdict on a claim that the verdict was obtained by fraud. Appellee learned on May 27, 1983, the date of the jury verdict, that Dr. Done was no longer affiliated with Wayne State University. This information, without more, was insufficient to give rise to a duty on appellee's behalf to conduct further discovery of Dr. Done's credentials after the jury had returned an adverse verdict. People leave universities for many reasons; leaving is not suspect in and of itself. Appellee still had no reason to believe that Dr. Done had not been affiliated with Wayne State at the time of his testimony or that the reasons for his de-

parture were relevant to the outcome of the trial, as appellee now contends. This circumstance changed somewhat when appellee learned on October 5, 1983, shortly after the trial judge had granted its motion for judgment notwithstanding the verdict, that Dr. Done had ceased to be on the Wayne State faculty prior to his testimony at trial. But even then appellee did not know the reasons for Dr. Done's departure. Since appellee obtained this information after the entry of judgment in its favor, appellee had no further reason to inquire about Dr. Done's credentials, and any motion attacking the verdict would have been superfluous, being simply additional grounds on which appellee could argue that it was entitled to judgment.

Accordingly, we hold that Judge Wolf did not err in finding that appellee, upon learning in May 1983 of Dr. Done's change in status, acted timely under the circumstances in filing its Rule 60 (b)(6) motion in July 1986, a little more than three months after *Oxendine I* was decided. *See Transit Casualty Co. v. Security Trust Co.*, 441 F.2d 788, 790-91 (5th Cir.), *cert. denied*, 404 U.S. 883 (1971); *cf.* 7 MOORE, FEDERAL PRACTICE, § 60.28 [2] at 60-316 & n.20 (1987).

III

Vacation of Judgment and Grant of a New Trial. Judge Wolf concluded that appellee was entitled to the "extraordinary relief [of vacation of a judgment and] a new trial after an appellate decision on the merits and almost five years after the original trial" because Dr. Done's "false testimony about his credentials" was "crucial" and created a "substantial danger that there was an unjust result" at the May 1983 trial. *See* Memorandum Order of February 11, 1986, at 3-5. Our review is limited to determining whether the judge abused his

discretion. *Profitt, supra*, 513 A.2d at 218; *Starling v. Jephunneh Lawrence & Assocs.*, 495 A.2d 1157, 1159 (D.C. 1985). Such an abuse exists if the trial court applies an incorrect standard of law or grants relief on the basis of findings of fact that are unsupported by the record. *See* D.C. Code § 17-305 (1981); *Designers of Georgetown, Inc. v. E.C. Keys & Sons*, 436 A.2d 1280, 1281 (D.C. 1981); *Robinson v. Jones*, 429 A.2d 1372, 1374 (D.C. 1981).

Rule 60 (b)(6) is intended for unusual and extraordinary situations justifying an exception to the overriding policy of finality. *See Klapprott v. United States*, 335 U.S. 601, 613 (1949); *Proffitt, supra*, 513 A.2d at 218 (citing *Railway Express Agency, Inc. v. Hill*, 250 A.2d 923, 925 (D.C. 1969); *Union Storage Co. v. Knight*, 400 A.2d 316, 318 (D.C. 1979); *Ohio Valley Constr. Co. v. Dew*, 354 A.2d 518, 521 (D.C. 1976)). Although relief under Rule 60 (b)(6) for "any other reason" is not to be narrowly construed, *see Starling, supra*, 495 A.2d at 1161 (citing *Klapprott, supra*, 335 U.S. at 614), for a verdict to be vacated on the ground of perjured testimony it must be clear that the perjury was material and not merely incidental to the contested issue. *Coleman v. Chudnow*, 35 A.2d 925, 927 (D.C. 1944).[6] To

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[6] *See also* Judge (now U.S. Supreme Court Justice) Brennan's oft-quoted standard in *Shammas v. Shammas*, 9 N.J. 321, 88 A.2d 204 (1952), for granting postjudgment relief under Rule 60 (b)(3) for fraud based on perjured testimony of a party:

> . . . a court may not set aside a final judgment merely because some testimony is perjured. . . . Perjured testimony that warrants disturbance of a final judgment must be shown by clear, convincing and satisfactory evidence to have been, not false merely, but to have been wilfully and purposely falsely given, and to have been material

award a new trial, the evidence must in fact have been newly discovered since the trial, its recent discovery cannot be due to a lack of diligence by the movant, and the evidence cannot be merely cumulative or impeaching but must be such as would probably produce a different verdict if a new trial were granted. *Mahallati v. Williams*, 479 A.2d 300, 305 (D.C. 1984); *Bradley v. Prince*, 105 A.2d 253, 254-55 (D.C. 1954).

The six misstatements found by Judge Wolf to constitute perjury concern Dr. Done's qualifications, not his opinions or methodology. Based on our review of the record before Judge Wolf, only Dr. Done's misrepresentation regarding his faculty status at Wayne State University at the time of trial requires extended discussion and, accordingly, we first dispose of the other five.

Five of Dr. Done's statements found by Judge Wolf to be misrepresentations were matters either previously known or readily capable of being learned by appellee in the course of conducting pretrial discovery about Dr. Done's qualifications as an expert. As such, they cannot be considered to have been newly discovered, and the failure to

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> to the issue tried and not merely cumulative but probably to have controlled the result. Further, a party seeking to be relieved from the judgment must show that the fact of the falsity of the testimony could not have been discovered by reasonable diligence in time to offset it at the trial or that for other good reason the failure to use diligence is in all the circumstances not a bar to relief.

9 N.J. at ——, 88 A.2d at 208-09 (citations omitted); *accord*, *Hohensee v. Grier*, 373 F. Supp. 1358, 1365 (M.D. Pa. 1974), *aff'd*, 524 F.2d 1403 (3d Cir. 1975), *cert. denied*, 426 U.S. 940 (1976). *Cf. Neuman v. Neuman*, 377 A.2d 393, 397 (D.C. 1977) (citing *Shammas v. Shammas*, *supra*, and other cases regarding interest in finality of judgments in denying, on ground of equitable estoppel, the vacation of a divorce decree).

discover them prior to trial shows a lack of diligence by appellee for which it has provided no explanation. *See Chong Moe Dan v. Maryland Casualty Co.*, 93 A.2d 286, 287-88 (D.C. 1952); *Great Southwest Fire Ins. Co. v. S.M.A. Inc.*, 59 Md. App. 136, ——, 474 A.2d 950, 957, *cert. denied*, 301 Md. 42, 481 A.2d 801 (1984). Judge Wolf found that Dr. Done had not been a member of the Formulary Committee at Children's Hospital since March 1982, that he had not been Chairman of the Committee since January 1982, that he had not been on the patient wards since December 1982, and that he had not had a laboratory assigned solely to him for two years before the trial and had conducted no research at any other laboratory during that period. The failure to know Dr. Done's exact title as professor and the areas of his expertise reveals a similar lack of diligence by appellee since the matters could have been learned during discovery. Except for Dr. Done's status at the University at the time of his testimony, which he concealed from both parties during trial, all the misrepresentations were discoverable prior to trial and, consequently, were matters of impeachment which could have been presented to the jury. As such, they cannot form a proper basis for granting the relief requested by appellee. *See Hohensee v. Grier*, *supra*, 373 F. Supp. at 1365 ("inconceivable" movant could not have controverted alleged perjury at trial).

Moreover, Judge Wolf's finding that in these five instances Dr. Done committed perjury, which requires proof of willfulness, *see* D.C. Code § 22-2511 (1988 Supp.), gives us pause since our reading of the record differs substantially from his, though we do not base our decision on this ground. Dr. Done's testimony regarding his laboratory work is equally consistent with the fact that

other professors shared the lab;[7] his testimony about his relationship to patients refers not to his responsibilities for seeing patients on the particular day on which he testified, but to his responsibilities over the year generally;[8] and he explained that he taught toxicology as

---

[7] Dr. Done testified as follows:

> Q. [Defendant's attorney] What percentage of time do you spend doing research?
>
> A. [Dr. Done] Well, I don't myself have to perform most of the research now, that I do in the laboratory, at least, because I have a full crew that does that and a man who directs the laboratory for me.
>
> So I am in charge of it in terms of overlooking it but not having to actually do all with my own hands.
>
> Now, the percentage is again difficult to estimate. It depends on whether you include the writing of it. If you do, that is, oh, I would judge, probably 20 percent in the last year, maybe 15.

At the evidentiary hearing, it was explained that the laboratory which Dr. Done was referring to was shared by all faculty members who had research proposals, and that the person who directed the lab did so for all of them. At another point during the May 1983 trial, Dr. Done testified that he did not have a lab solely for his own use at Children's Hospital.

[8] The relevant testimony was:

> Q. [Defendant's attorney] When is the last time you were on the ward before today?
>
> A. [Dr. Done] In December.
>
> Q. December of 1982?
>
> A. That's right.
>
> Q. Well, then, would that mean between December 1982 and now, May of 1983, you haven't been responsible for the care and treatment of patients?
>
> A. No, not at all. I was saying that when I am doing that, I am responsible for all the patients on a particular

part of the course of pharmacology.[9] It is hardly unusual for a witness who is on the stand for hours, as was Dr. Done, to slip up, use the wrong verb tense, or misspeak at times. *See Metlyn Realty Corp. v. Esmark, Inc.*, 763 F.2d 826, 833 (7th Cir. 1985).

As to Dr. Done's trial testimony that he was on the medical faculty at Wayne State University as of May 1983, the record supports Judge Wolf's finding that Dr. Done misrepresented his status at the University. The judge could properly reject Dr. Done's explanation at the Rule 60 (b)(6) hearing that at the time of trial he believed he was still on the faculty,[10] and credit instead the testimony of Dean Nadler of Wayne State University who testified that he accepted Dr. Done's resignation by letter dated April 29, 1983, which he sent to Dr. Done, and that Dr. Done was no longer considered a member of the Medical School faculty on May 9, 1983, or any date thereafter. *See Flippo Constr. Co. v. Mike Parks Diving*

---

ward, and so that will occupy roughly half of my time while I am attending.

I see patients all through the year in terms either of their being referred to me because it is in my area of special interest or I am asked to consult, if I am teaching students or house officers.

Then I will see them then because almost all of my teaching, in pediatrics at least, is bedside teaching on patients.

I see patients all through the year. Patient-wise, that will vary all the way from five or ten percent, some months, up to 50 percent in some months.

[9] Dr. Done maintains that the court reporter and not he put the capital letters on pharmacology and toxicology, thus creating the supposed faculty title.

[10] Dr. Done testified at the Rule 60 (b)(6) hearing that, when he sent his letter of resignation, he was hoping to work out some other arrangement with the University.

Corp., 531 A.2d 263, 273 (D.C. 1987). Dr. Done requested in his letter of resignation that his termination be effective by the end of April. The record also supports Judge Wolf's finding that counsel for neither party was aware prior to or at trial that Dr. Done's status at the University had changed. Therefore, this evidence was new and not discoverable by appellee by reason of due diligence.

The question remains whether this finding of perjury is material and would have affected the outcome of the trial. The evidence before Judge Wolf reveals that the issue between Dr. Done and the University concerned his loyalty to the University, not his qualifications or expertise, and nothing in the record disputes Dr. Done's qualifications to teach and his significant contributions to his fields of expertise. In view of Dr. Done's extensive resume, the minor portion of Dr. Done's testimony before the jury at issue, and the evidence presented at the Rule 60 (b)(6) hearing concerning the circumstances leading to Dr. Done's resignation, we hold that Judge Wolf erred in concluding that Dr. Done's misrepresentation about his faculty status would have affected the outcome of the trial.

Judge Wolf stated in his Memorandum Order, for example, that Dr. Done's

> professional witness status led him to shirk his duties at the Wayne State Medical School. That got him fired (gently, by a forced resignation). The true circumstances of that resignation detracted from his professional witness status, and so he covered it up with lies to maintain his purported status.

Memorandum Order at 4. The judge also stated that Dr. Done's trial testimony "grossly misrepresented his

standing in the educational community." *Id.* at 6. Dr. Done admitted that while on the medical faculty at the University he had testified as an expert in numerous trials and that this took him away from the campus. But there was uncontroverted evidence that Wayne State retained a very high opinion of Dr. Done's academic capabilities and professional contributions. Dean Nadler testified that he did not ask for Dr. Done's resignation because of any concern that Dr. Done's academic reputation had deteriorated, but because of other problems, such as Dr. Done's absences from the hospital and his failure to attract external research funding. The Dean explained that the University had to reevaluate and let go faculty members in the early 1980s in response to budget cuts mandated by the State of Michigan as a result of the 1981 recession. Dean Nadler also testified that he had not been concerned with the quality of Dr. Done's teaching; in fact, he was sorry to see Dr. Done leave because Dr. Done had made "significant contributions to pediatrics and toxicology" while at the University. Indeed, in his letter accepting Dr. Done's resignation, Dean Nadler stated that he was willing to discuss with Dr. Done the "possibility of some voluntary affiliation." In addition, although Judge Wolf discredited Dr. Done's testimony in this regard, there was independent evidence in the form of a letter written by Dr. Done's immediate supervisor that Dr. Done had serious health problems which contributed to his not being able to fulfill all his teaching obligations at the University.[11]

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[11] On January 18, 1983, Dr. Done's immediate supervisor, Larry E. Fleischmann, M.D., Professor and Interim Chairman, Department of Pediatrics, Wayne State University, School of Medicine, wrote to Dr. Done:

> . . . regarding [my] concern over your health problems and the difficulties they have caused you in relation to

Accordingly, the record does not support the conclusion either that Dr. Done's academic standing had deteriorated to the point that he would have been qualified as a witness at the original trial or that his credibility would have been so undermined by the circumstances surrounding his resignation from Wayne State University as to affect the jury's verdict. *See Potts v. Catterton*, 82 A.2d 133, 134 (D.C. 1951) (where evidence is merely cumulative or impeaching, strong doubt that it would necessarily lead to different result if case were retried).[12] Moreover, it is questionable whether the circumstances surrounding Dr. Done's resignation from Wayne State

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> your academic duties. . . . [they] have prompt[ed] me to inquire as to whether in the opinion of yourself and your physicians, these problems would continue to give you significant difficulty in the area of the performance of your academic duties, particularly in regard to resident and student teaching assignments in this time when the University's financial situation is causing us to ask more and more of our faculty members in regard to this most inportant [sic] of our duties. If it appears that the problems are of such chronicity that they will pose difficulty . . . I would be willing to meet with you to discuss alternative arrangements other than a full-time "full load" arrangement.

Appellee's Exhibit No. 7.

[12] Judge Wolf's finding that Dr. Done's "lies went so much toward enhancing his status as a witness that he reeks of the hired gun who will say anything that money can buy so long as it is glibly consistent with his prior testimony in other cases," Memorandum Order at 4, is troubling. Appellee's expert witnesses at trial also were "hired guns," and, in any event, this is a matter about which appellee cross-examined Dr. Done at trial. The "hired gun" appellation does not advance the necessary analysis.

University would have "probably aid[ed] the trier in his search for truth," the standard for admitting testimony regarding an expert's qualifications, MCCORMICK ON EVIDENCE, § 13 at 29-31 (E. Cleary, 2d ed. 1972) (quoted in *Dyas v. United States*, 376 A.2d 827, 832 (D.C.), *cert. denied*, 434 U.S. 973 (1977)), or whether appellee would have been permitted to explore such collateral matters at trial. *See Washington v. United States*, 499 A.2d 95, 101 (D.C. 1985) (extrinsic evidence inadmissible to impeach a witness on collateral issues). If the evidence had been admitted, appellant, in any event, probably would have been allowed to respond with rehabilitative evidence on Dr. Done's behalf. *See Rease v. United States*, 403 A.2d 322, 327-28 (D.C. 1979).

This is not a case involving an imposter, as in *Trapp v. American Trading & Prod. Corp.*, 66 A.D.2d 515, —, 414 N.Y.S.2d 11, 12 (1979), where the expert, contrary to his testimony, held no degrees, graduate or undergraduate, never completed his freshman year in college, held no licenses in his field of expertise, and, in essence, was not an expert. Neither party disputes that Dr. Done has a distinguished forty-year career in his fields of expertise. Nor is this case like *Herington v. Smith*, 138 Ill. App. 3d 28, 485 N.E.2d 500 (1985), where the medical expert lied about the university and medical school from which he graduated and the kind of medical license he held. *Id.*, 138 Ill. App. 3d at —, 85 N.E.2d at 502.[13]

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[13] All the other cases cited by appellee either have more egregious facts, are not on point, or are otherwise distinguishable. In *Harre v. A.H. Robins Co., Inc.*, 750 F.2d 1501, 1503-04 (11th Cir. 1985), contrary to the instant case, the expert witness testified falsely on the ultimate substantive issue in the case. Moreover, *Harre* was criticized in *Metlyn Realty Corp., supra*, 763 F.2d at 832 n.3, where the circuit court

Oxendine I settled the question regarding appellant's entitlement to a verdict in her favor on the basis of Dr. Done's testimony; thus, not only is Judge Wolf's conclusion that Dr. Done's testimony at trial was "of doubtful logic" and "a profoundly minority view within the scientific community," Memorandum Order at 5-6, precluded by *Oxendine I*, it is not supported by his factual findings.[14]

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affirmed the denial of a motion under Rule 60 (b) (3) for alleged fraud in a tender-offer case. The court criticized *Harre* as "a bit strained," stating that judgments should be reopened only when the party's perjury was "extensive and right at the core of the issues" and not in "less serious cases of alleged fraud." *Id.* The court noted that most courts "are quite shy about reopening judgments on account of perjury even in criminal cases," *id.* (citing *United States v. Krasny*, 607 F.2d 840, 843 (9th Cir. 1979), *cert. denied*, 445 U.S. 942 (1980)), and inserted a long discussion of the "good reasons for the stringent limits on reopening a final judgment." *Id.* at 830. The court also noted, "the inevitable shortfalls of the legal system do not call for revisiting judgments. . . . even if the first proceeding was flawed, there is no assurance that the second proceeding will come closer to the truth." *Id. McKinney v. Boyle*, 404 F.2d 632 (9th Cir. 1968), *cert. denied*, 394 U.S. 992 (1969), is not on point because the court in that case merely reversed a denial of a Rule 60 (b) (3) motion and remanded on the ground that relief under Rule 60 (b) (6) may have been available.

[14] Both appellee and Judge Wolf refer to the United States District Court judge's decision in *Richardson v. Richardson-Merrell, Inc.*, 649 F. Supp. 799 (D.D.C. 1986), *aff'd*, 857 F.2d 823 (D.C. Cir. 1988), granting appellee judgment notwithstanding the verdict, contrary to our decision in *Oxendine I*. However, as noted by the district court judge and the United States Court of Appeals for the District of Columbia Circuit, there was different evidence presented in *Richardson*. 649 F. Supp. at 802; 857 F.2d at 825 n.9. The record in *Richardson* is not before us, nor was it before Judge Wolf. Hence, it cannot influence our decision.

Accordingly, the judgment is reversed and the case remanded to the motions judge to reinstate the jury verdict as directed in *Oxendine I*.[15]

Remanded with instructions.

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[15] Appellee also asks this court to review the admissibility of Dr. Done's testimony at the May 1983 trial even though appellee never raised this issue at either the 1983 trial or the 1987 Rule 60 (b) (6) evidentiary hearing, or on the previous appeal. We decline to do so. This court addressed the merits in appellant's direct appeal, *see Oxendine I*, and appellee has presented no grounds on which to be entitled to raise this issue in this interlocutory appeal. *Cf. Chase v. Gilber*, 499 A.2d 1203, 1209 (D.C. 1985); *Miller v. Avirom*, 127 U.S. App. D.C. 367, 369-71, 384 F.2d 319, 322-23 (1967).

Supreme Court, U.S.
FILED
SEP 20 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

CARITA RICHARDSON, BY S. & E. RICHARDSON, GUARDIANS, et al.
Petitioners,

v.

RICHARDSON-MERRELL, INC.
Respondent.

SUPPLEMENTAL BRIEF OF PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

We reproduce herein the recent (September 8, 1989) dissents from denial of rehearing en banc in *Brock v. Merrell Dow Pharmaceuticals, Inc.* 874 F.2d 307 (5th Cir. 1989). They epitomize the issue we seek to bring before this court—whether a plaintiff can be deprived of a verdict rendered in her favor by a jury, in a diversity case which depends upon expert evidence, by the device of having the Court hold that plaintiff's experts have no basis for their testimony, though all were held by the trial judge to be qualified, and their testimony was never ruled to be inadmissible. This is an issue boiling to the surface in jury cases (involving scientific evidence) all over this country; it is an issue whose time has come.

We said in our Petition for Certiorari, p. 14, that the decision below "has sent shivers across the country among members of the bar. It has thrown into doubt the continuing role of the jury in a case involving scientific evidence". And then we said

> Already another Court of Appeals has utilized the approach of the Court below to reverse a jury verdict and entry of judgment for plaintiffs in another Bendectin

case, holding that the court could find insufficient the testimony of numerous qualified scientific experts that this drug caused plaintiff's birth defects. *Brock v. Merrell Dow Pharmaceuticals, Inc.*

In the *Brock* case, rehearing en banc has just been denied, but of the 14 judges voting, *six dissented from the denial*. There were two dissenting opinions. Judge Reavley, writing for all six dissenters, begins by saying, "I wonder what is left in this circuit of. . . the Seventh Amendment right to trial by jury", pointing out that six "highly qualified and experienced experts testified that Bendectin is a human teratogen, i.e., capable of causing human birth defects", and three of those experts gave their opinions that Bendectin was a cause of plaintiff's birth defect.

Judge Higginbotham writes in dissent that he believes the case should be considered en banc because it involves "one of the most vexing problems currently facing the federal courts—the role of experts". Stating the problems, he says: "We should confront them—and state the guiding principle, if we can". And although Judge Reavley refers to Federal Rule of Evidence 703, Judge Higginbotham says that "the issues reach further than questions of correct application of the rules of evidence in a particular case". The "issues involve larger questions of fairness and judicial roles *and our commitment to the jury system*" (Emphasis added).

This Court should do what Judge Higginbotham exhorted the Fifth Circuit to do—"confront" the issue and "state the guiding principle, if we can".

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APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 88-2311

MR. AND MRS. FLOYD BROCK, individually
and as next friend of Rachel Brock, a minor,
Plaintiffs-Appellees,

versus

MERRELL DOW PHARMACEUTICALS, INC.,
Defendant-Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS

(September 8, 1989)

ON SUGGESTION FOR REHEARING EN BANC
(Opinion June 6, 5th Cir, 1989, 874 F.2d 307)

Before CLARK, Chief Judge, GEE, REAVLEY, POLITZ, KING, JOHNSON, WILLIAMS, GARWOOD, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, and DUHE, Circuit Judges.

PER CURIAM:

The judges in regular active service of this court having been polled at the request of one of them, and a majority of the judges having voting against granting rehearing en banc in this case (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

REAVLEY, Circuit Judge, with whom POLITZ, KING, JOHNSON, WILLIAMS, and HIGGINBOTHAM, Circuit Judges, join dissenting from the denial of rehearing en banc:

If the court, by refusing to rehear en banc, approves the panel's application of *Boeing Co. v. Shipman*, 411 F.2d 365 (5th Cir. 1969), I wonder what is left in this circuit of the *Boeing* rule or, for that matter, the Seventh Amendment right to trial by jury.

Six highly qualified and experienced experts testified that bendectin is a human teratogen, i.e. capable of causing human birth defects. Three of them testified to the opinion that bendectin was a cause of Rachel Brock's deformation. Their opinions of causation were not the product of faulty syllogisms but were predicated upon medical study and research and upon their explanation of the process by which the doxylamine element in bendectin can interfere with the development of nerve cells in an embryo. The panel picks at details in the testimony lacking expert consensus, but its characterization of this voluminous expert proof as "speculation" could just as well doom virtually all expert testimony. The panel reaches its climax with the novel declaration that only epidemiological studies can prove causal relation between bendectin and birth defects, and it enters into the debate with Dr. Glasser on the statistical significance of the Heinonen study. In the absence of expert consensus must we now always await population studies before a just

verdict may be based upon medical opinion? So says the panel, at least for bendectin cases. This, despite the testimony here that case reports and laboratory research reveal teratogens and that no epidemiological study has ever discovered a teratogen.

The panel tries to draw support from *Richardson by Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823 (D.C. Cir. 1988), but that court ruled that the plaintiff's medical expert lacked an adequate basis, of the type reasonably relied upon by experts in his field, for his opinion, which left no support for the verdict. That record was a far cry from the one we are called upon to review here. Though it tinkers with bits of the extensive expert testimony in this record, our panel does not purport to hold that the foundation for the opinions of these experts fails to satisfy Federal Rule of Evidence 703.

We dissent.

HIGGINBOTHAM, Circuit Judge, concurring in Judge Reavley's dissent:

I join Judge Reavley in dissenting from the refusal of the court to consider this case en banc. I do not dissent because I think that the panel reached the wrong conclusion—about that I am not sure. I prefer to examine this case en banc because the panel's opinion shies from a direct confrontation with one of the most vexing problems currently facing the federal courts—the role of experts.[1] This case raises important questions about the role of experts in the federal courts including whether we should

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[1] I doubt that the drafters of the Federal Rules of Evidence foresaw the impact of their changes in the rules for expert witnesses. The changes were seen as enhancing efficiency and adopting for the courtroom standards of reliance sufficient for the community in its daily affairs. The actual changes have cut more deeply and indeed, in many ways, have materially changed the dynamics of trial.

accept opinions of experts not based upon a generally accepted scientific principle and the more broadly stated concern that substantive principles such as tort law are not handling science issues in a rational manner.[2] We should confront them—and state the guiding principle, if we can.

A significant body of judicial and academic comment has expressed fear concerning these dangers. Several examples of such comments were collected by Barry Epstein and Marc Klein in an article for *Seton Hall Law Review*.[3] The authors found such concerns expressed as early as 1853 in the following language from a federal court opinion:

> [T]he experience of all concerned in the administration of justice tends to the conclusion that this species of evidence is less satisfactory than any other. . . . [W]here there is any room for a difference of opinion, experts, in about equal numbers, will generally be found testifying on each side.[4]

Much more recently, the Attorney General's Tort Policy Working Group reported an "increasingly serious problem" of

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[2]This question has, of course, been debated in varying intensity since the 1923 decision of the District of Columbia Circuit Court of Appeals in *Frye v. United States*, 293 F.1013 (D.C. Cir. 1923). Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 Harv. L. Rev. 40 (1901).

[3]Epstein & Klein, *The Use and Abuse of Expert Testimony in Product Liability Actions*, 17 Seton Hall L. Rev. 656 (1987).

[4]*Id.* at 660 n.13 (quoting *Wilkinson v. Greely*, 29 F. Cas. 1259, 1262-63 (C.C.D. Mass. 1853)).

> reliance by judges and juries on noncredible scientific or medical testimony, studies or opinions. It has become all too common for 'experts' or 'studies' on the fringes of or even well beyond the outer parameters of mainstream scientific or medical views to be presented to juries as valid evidence from which conclusions can be drawn. The use of such invalid scientific evidence (commonly referred to as 'junk science') has resulted in findings of causation which simply cannot be justified or understood from the standpoint of the current state of credible scientific and medical knowledge. Most importantly, this development has led to a deep and growing cynicism about the ability of tort law to deal with difficult scientific and medical concepts in a principled and rational way.[5]

It has been eighty-eight years since Judge Leonard Hand identified two practical defects with a system depending on a conflict between expert witnesses in front of a lay jury. First, he wrote, "the expert becomes a hired champion of one side":

> Enough has been said elsewhere as to the natural bias of one called in such matters to represent a single side and liberally paid to defend it. Human nature is too weak for that. . . .

Second, Hand asserted, the conflict between opposing experts leaves the jury no rational basis for choosing between them:

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[5] *Id.* at 656-57 (quoting Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (February 1986)).

> The trouble with all this is that it is setting the jury to decide, where doctors disagree. The whole object of the expert is to tell the jury, not facts, as we have seen, but general truths derived from his specialized experience. But how can the jury judge between two statements each founded upon an experience confessedly foreign in kind to their own? It is just because they are incompetent for such a task that the expert is necessary at all.

It strikes me that the issue in this case revolves around the admissibility of the expert testimony. Indeed, we ought to be wary of opinions of scientists expressed in court free of their traditional restraints of peer review and scientific consensus. *See In re Air Crash Disaster at New Orleans, Louisiana,* 795 F.2d 1230 (5th Cir. 1986). Yet, while skepticism permeats its opinion, the panel does not seem to engage the question at this juncture. Rather, the panel chooses to accept the admissibility of the testimony and to quarrel with its effect. I share much of the panel's concern and might join them if I were confident of their focus. Yet, the translation of these concerns into administrable rules is absent. The concerns only manage to bubble to the surface and then not in a coherent way that fully discloses.

Regardless, the issues reach further than questions of correct application of the rules of evidence in a particular case. Surely, these questions are worthy of en banc consideration, particularly when we cannot today close our eyes to the rapidly increasing upward pressure of an expanding base of federal cases. This upward force, capped at the top by the full capacity of the Supreme Court, is generating serious proposals for changing the structure of

the Courts of Appeals. We are obligated to use our resources as best we can to mitigate this pressure. This means that we must be more willing to utilize en banc procedures to tackle difficult problems by reducing intra-circuit and inter-circuit conflicts. It also means that we ought not leave this lion in the busy street of our trial courts and inevitably multiply the appellate workload.

Describing the issues in the language of efficiency and impact on the courts presents only a part, and not the most important part, of larger questions of fairness and judicial roles and our commitment to the jury system. Ultimately, it is no more than that we are obligated to state the law, certainly if we truly expect people to order their affairs by its measure. We are not doing that here. When we fail to explain, we must ask if it is because we cannot. I join Judge Reavley's wise caution.